Supreme Court, U.S.
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No. (1)

In The Supreme Court of the United States

DELMON LEE, JR.,

Petitioner,

v.

E. NORRIS TOLSON, in his official capacity as the SECRETARY of the NORTH CAROLINA DEPARTMENT OF REVENUE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

Thomas Edward Hodges
ATTORNEY AT LAW
100 North Market Street
Post Office Box 697
Benson, North Carolina 27504
(919) 894-2603

Counsel for Petitioner

THE LEX GROUP • 1108 East Main Street • Suite 1400 • Richmond, Virginia 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3660 • www.thelexgroup.com

QUESTIONS PRESENTED

INTERPRETATION OF N.C. GEN. STAT. § 105-241.4 BY NORTH CAROLINA COURT OF APPEALS AND PASSED OVER BY NORTH CAROLINA SUPREME COURT DENIED PETITIONER TRIAL ON CLAIMS FILED UNDER N.C. GEN. STAT. § 105-267 FOR OVER PAYMENT OF UNAUTHORIZED SUBSTANCES TAX ASSESSED ON SLOP OR SPENT MASH AND UNREASONABLE SEARCH AND SEIZURE OF HIS RESIDENCE.

1. WHETHER PETITIONER TIMELY FILED SUIT UNDER N.C. GEN. STAT. § 105-267 FOR A REFUND OF THE OVER PAYMENT OF UNAUTHORIZED SUBSTANCE TAXES ASSESSED ON SLOP OR SPENT MASH AND HIS 42 U.S.C. 1983 CLAIM FOR AN UNREASONABLE SEARCH AND SEIZURE OF CASH FROM HIS RESIDENCE IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION?

2. WHETHER PROBABLE CAUSE EXISTED FOR ISSUANCE OF THE SEARCH WARRANT TO SEARCH PETITIONER'S RESIDENCE?

3. WHETHER PROBABLE CAUSE EXISTED FOR THE SEARCH AND SEIZURE OF THE LOCKED BOX AND ITS CONTENTS FROM PETITIONER'S BEDROOM CLOSET?

LIST OF PARTIES TO PROCEEDING

The parties in the proceeding below are those listed in the caption.

CORPORATE DISCLOSURE STATEMENT

In accord with Supreme Court Rule 29.6, Petitioner states that he is an individual with no parent corporation.

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THIS CASE SERVES AS A TWO-PART VEHICLE FOR THIS COURT TO REVISIT AND REAFFIRM THE PRINCIPLES FOR ADJUDGING BOTH THE CONSTITUTIONALITY OF AN INFORMANT''S TIP UNDER THE-TOTALITY OF CIRCUMSTANCES APPROACH SET OUT IN *ILLINOIS V. GATES*, 462 U.S. 213, AND THE PLAIN VIEW DOCTRINE SET OUT IN *HORTON V. CALIFORNIA*, 496 U.S. 128 AND *ARIZONA V. HICKS*, 480 U.S. 321 18

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Petitioner, Delmon Lee Jr., petitions the Supreme Court of the United States to grant a writ of certiorari to review the order of the North Carolina Supreme Court entered on December 2, 2004 denying discretionary review of the judgment and opinion of the North Carolina Court of Appeals.

REFERENCE TO OPINIONS BELOW

The order of the North Carolina Supreme Court denying discretionary review of the decision of the North Carolina Court of Appeals is reported at 359 N.C. 190 (2004). (Petitioner's Appendix ("Pet. App.") 23). The opinion of the North Carolina Court of Appeals is reported at 601 S.E.2d 316 (2004). (Pet. App. 1).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. 1257. The order of the North Carolina Supreme Court was entered on December 2, 2004 denying discretionary review of the decision of the North Carolina Court of Appeals filed on September 7, 2004.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment states in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment states in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 states in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United

States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

N. C. Gen. Stat. § 105-113.105

The Purpose of this Article is to levy an excise tax to generate revenue for State and local law enforcement agencies and for the General Fund. Nothing in this Article may in any manner provide immunity from criminal prosecution for a person who possesses an illegal substance.

N.C. Gen. Stat. § 105-241.1

(c) Hearing. - A taxpayer who objects to a proposed assessment of tax is entitled to a hearing before the Secretary as provided in this subsection. To obtain a hearing, the taxpayer must file a written request either for a hearing or for a written statement of the information and

evidence upon which the proposed assessment is based. If the notice of a proposed assessment was mailed, the taxpayer's request must be filed within 30 days after the date the notice was mailed; if the notice of a proposed assessment was delivered in person, the taxpayer's request must be filed within 30 days after the date the notice was delivered.
(Pet. App. 117)

N.C. Gen. Stat. § 105-241.2

(a) Petition for Administrative Review. - Without having to pay the tax or additional tax assessed by the Secretary under this Chapter, any taxpayer may obtain from the Tax Review Board an administrative review with respect to the taxpayer's liability for the tax or additional tax assessed by the Secretary. Such a review may be obtained only if the taxpayer has obtained a hearing before the Secretary and the Secretary has rendered a final decision with respect to the taxpayer's liability. If a taxpayer has made a timely written demand for refund of an alleged overpayment and the Secretary has issued a decision denying part or all of the claimed refund, the taxpayer may obtain from the Tax Review Board an administrative review of the Secretary's decision. To obtain

administrative review the taxpayer must take the following actions:

(1) Within 30 days after the Secretary's final decision is issued, file with the Tax Review Board, with a copy to the Secretary, notice of intent to file a petition for review.

(2) Within 60 days after filing a notice of intent under subdivision (1) of this subsection, file with the Tax Review Board, with a copy to the Secretary, a petition requesting administrative review and stating in concise terms the grounds upon which review is sought.
(Pet. App. 125).

N.C. Gen. Stat. § 105-241.4:

Any taxpayer who has obtained an administrative review by the Tax Review Board as provided by G.S. 105-241.2 and who is aggrieved by the decision of the Board may, in lieu of appealing pursuant to the provisions of G.S. 105-241.3, within 30 days after notification of the Board's decision with respect to liability pay the tax and bring a civil action for its recovery as provided in G.S. 105-267.
(Pet. App. 131).

N.C. Gen. Stat. § 105-267

> The suit may be brought in ... the county in which the taxpayer resides at any time within three years after the expiration of the 90-day period allowed for making the refund. (Pet. App. 132).

STATEMENT OF THE CASE

In December 1998, North Carolina Alcohol Law Enforcement (ALE) received a complaint that a distillery was located behind a large white house near Bethel Road in Harnett County, North Carolina. ALE began an investigation and determined a distillery appeared to be housed in a certain building located on lands owned by Larry Fitch Clark, Sr. (Clark). From their position in the wood line bordering the building, ALE agents on 28 December 1998, 6 January 1999 and 8 January 1999 detected the odor of fermenting mash emanating from the building. On 13 January 1999, ALE and various other officers began a three-day round the clock surveillance of Clark's property. During the round the clock surveillance, officers did not actually see the cooking process going on inside the building, but they did observe radiant heat and steam rising from the building, detected the odor of mash and heard propane burners at work with exhaust fans, leading them to believe that something was being cooked in the building. On 13 January 1999, officers observed Clark and Petitioner loading and rearranging liquor on a U-haul trailer outside the building. The officers neither observed any supply vehicles entering Clark's property with a load of sugar or plastic jugs nor

any slop or spent mash being discharged out of the building into the wood line. The three-day surveillance culminated on 15 January 1999, when ALE obtained a warrant to search Clark's building. (Pet. App. 56-58).

On 15 January 1999, narcotics agent Jaggers of the Harnett County Sheriff's Department submitted an application with three sworn attachments (Pet. App. 59-67) to a magistrate for a warrant to search a residence described in Attachment #2 (Pet. App. 64) as a single story brick house with white doors located on Bethel Baptist Church Road in Harnett County. Attachment #1 (Pet. App.62) describes the property to be seized as:

> Alcoholic beverages specifically non-tax paid alcohol. Items used to package alcoholic beverages as well as items used to introduce into the body alcoholic beverages, documents, writings indicative of the sale, purchase, delivery or receipt of alcoholic beverages. Photographs, letters, documents of persons in control of the premises or receiving alcoholic beverages at the premises. U.S. currency which apparently has been received or derived from the sale or delivery of alcoholic beverages or other illegal activities. Documents, writings which are intricative (sic) of or which identify assets which may have been acquired through the proceeds of illegal activities.

> Documents, writings which instruct, direct or advise persons how to manufacture or distribute alcoholic beverages.

To establish probable cause, the first paragraph of Attachment #3 (Pet. App. 65-66) sets out agent Jaggers' educational background in law enforcement with emphasis on drug enforcement, assigned to the narcotics division of the Harnett County Sheriff's Department for over four years, participation in the execution of search warrants and gathering information for search warrants, made over 400 arrests for violations of the North Carolina Control Substance Act and numerous arrests for other crimes, including breaking and entering, larceny, rape, prostitution, and sexual offenses. This paragraph, however, does not indicate any training or experience acquired by agent Jaggers in investigating and enforcing liquor law violations. The second paragraph of Attachment #3 (Pet. App. 66) reveals:

> Within the past 72 hours of the date and time of this warrant affiant Jaggers was contacted by a confidential source of information (CSI) and this source stated to affiant Jaggers that they had been to the residence described in attachment #2 in the past 72 hours of the date and time listed in the warrant and they observed a quantity of non-tax paid alcohol in the residence. This CSI stated that they knew the substance to be non-tax paid alcohol because they have used non-tax paid alcohol in the past. This CSI is reliable to the affiant Jaggers because they have led the affiant Jaggers to at least five arrests for controlled substance violations in the past 12 months.

Based on the foregoing, without any corroboration or verification of the informant's tip, [1] agent Jaggers obtained the warrant to search the residence.

On 15 January 1999, in simultaneously conducted raids, ALE and Harnett County Sheriff's deputies executed the warrant for the search of the building located on Clark's land, and agent Jaggers and other deputies of the Harnett County Sheriff's Office Narcotics Division executed the warrant for the search of Petitioner's residence. (Pet. App.58, 68). Arrest

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[1] In his answer to paragraph 30 of Petitioner's complaint, Respondent admits that the search warrant and supporting documents are void of any information indicating that agent Jaggers attempted to corroborate or verify the informant's story prior to obtaining the search warrant. (Pet. App. 37,51).

reports reflect the raid on Clark's building resulted in the seizure of a distillery, 1,552 gallons of moonshine and 9,485 gallons of mash.[2] (Pet. App. 107,116).

After an extensive search of Petitioner's residence did not reveal any non-tax paid liquor (Pet. App. 68-69), officers continued their search, concentrating on Petitioner's bedroom, where they seized a locked box from the bedroom closet. Under threat of forcing open the box, Petitioner opened it, and the officers seized the contents - $37,200 in cash, which was contained in bank bags, and some labeled "mother-in-law's." (Pet. App. 68-69)

On 15 January 1999, the Secretary of Revenue prepared a report of arrest and/or seizure and a warrant for collection of unauthorized substances taxes against Clark and Petitioner in the sum of $32,006.40, plus penalty of $3,200.64 and interest of $213.38, for a total tax indebtedness of $35,420.42, with a distribution of 25% to the State's general fund, 37.5% to the Harnett County Sheriff's Department and 37.5% to ALE. (Pet. App. 109-110,115- 116). On 15 January 1999, an enforcement officer of the North Carolina Department

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[2] As to the credibility of agent Adjoran's and agent Jackson's reports, agent Adorjan testified at the 23 July 1999 hearing before the Assistant Secretary that either during the week of the raid (15 January 1999) on the distillery or the following week, he hand delivered a mash sample to the State Lab and had the results back quite some time. (Pet. App. 88-90). The analysis (Pet. App. 75-77) reflects the sample was submitted on 24 August 1999, analyzed on 10 October 1999 and transcribed on 12 October 1999. The Assistant Secretary mailed the results to Petitioner's counsel on November 30, 1999, more than ten and one-half months after the raid on the distillery. (Pet. App. 73-74).

of Revenue executed the warrant against Petitioner by levying on the seized cash in the custody of the Harnett County Sheriff's Department and collected the sum of $32,006. (Pet. App. 111-112). The assessment of unauthorized substances taxes was paid within forty-eight hours of the 19 January 1999 proposed assessment (Pet. App. 106-108), thereby eliminating the assessment of penalty and interest.[3] On 25 January 1999, with the approval of agent Jaggers, the Harnett County Sheriff's Department returned the balance of the $5,194 seized cash to Petitioner. (Pet. App. 113-114). On 28 March 1999, Clark and Petitioner plead guilty to certain liquor charges filed against them in connection with the raid on the distillery. On 24 May 1999, the District Attorney's Office dismissed the charges filed against Petitioner in connection with the raid on his residence.

On 18 February 1999, Petitioner mailed a certified letter to the Secretary protesting the assessment of taxes against him and requesting a hearing to determine the validity of the assessment. On 23 July 1999, the assistant Secretary held the administrative tax hearing, and on 10 April 2002, rendered a final decision (Pet. App. 12) upholding the assessment and denying Petitioner's request for a refund. On 9 May 2000, Petitioner provided the Tax Review Board with written notice of his intent to petition for administrative review of the Assistant Secretary's final decision. On 10 July 2000, Petitioner filed his petition for review to the Tax Review Board. On 15 August 2001, the Tax Review Board held a

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[3] See excerpt from transcript of hearing before Assistant Secretary of Revenue, p. 3, lines 1-8. (Pet. App. 83).

hearing, and by decision dated 9 November 2001, confirmed the Assistant Secretary's final decision.[4]

On 17 May 2002, Petitioner filed an application and order extending time to file his complaint to on or before 5 June 2002. (Pet. App. 70-72). On 5 June 2002, Petitioner filed suit pursuant to N.C. Gen. Stat. § 105-267 for a refund of the over payment of unauthorized substances taxes assessed on slop or spent mash and for an unlawful search and seizure of money from his residence in violation of the Fourth and Fourteenth Amendments, 42 U.S.C. 1983, and Article I, Sections 19 and 20 of the North Carolina Constitution. (Pet. App. 44). On 13 January 2003, Petitioner appeared in Harnett County Superior Court for trial. The lower court, notwithstanding Petitioner's representation for the record that he did not receive a calendar notice of motion hearing,[5] heard Respondent's motion for summary judgment, and on 10 February 2003, entered an order granting Respondent's motion for summary judgment. (Pet. App. 10-11). On 11 March 2003, Petitioner filed a notice of appeal to the North Carolina Court of Appeals. (Pet. App. 28-29). In a decision filed

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[4] In his answer to paragraph 17 of Petitioner's complaint, Respondent admits the allegations that Petitioner timely filed a letter of protest and requested a hearing. (Pet. App. 37-48). In his answers to paragraphs 19-22 of Petitioner's complaint, Respondent admits the remaining dated allegations of this paragraph. (Pet. App. 37,48-49).

[5] See excerpt from trial transcript of summary judgment hearing, p. 3, lines 19-25; p. 4, lines 1-9. (Pet. App. 30-31). Also see stipulation no. 5 in the record on appeal stating that Respondent neither calendared his motion for summary judgment nor provided Petitioner with notice of hearing. (Pet. App. 25-26).

7 September 2004, the North Carolina of Appeals, without addressing Petitioner's assignment of errors pertaining to the lack of calendar notice and the propriety of summary judgment, affirmed summary judgment on the grounds that Petitioner did not timely bring suit in the trial court within 30 days after the Tax Review Board rendered a decision on 9 November 2000. (Pet. App. 1). On 12 October 2004, Petitioner filed a petition for discretionary review to the North Carolina Supreme Court. On 2 December 2004, the North Carolina Supreme Court entered an order denying the petition for discretionary review. (Pet. App. 23).

REASONS FOR GRANTING WRIT

Petitioner does not call upon the Court to address a state court decision that has decided an important federal question in a way that conflicts with the decision of another state court of last resort, another federal court or this Court. Instead, Petitioner calls upon the Court to review a state court decision that interprets a state statute in a way that snuffs out and denies a forum for a taxpayer to litigate important state and federal questions.

THE INTERPRETATION OF N.C. GEN. STAT. § 105-241.4 BY THE NORTH CAROLINA COURT OF APPEALS EVISCERATES THE PLAIN MEANING OF THE STATUTE BY DENYING A TAXPAYER A FORUM TO BRING SUIT AGAINST THE SECRETARY IN DEFENSE OF A TAXPAYER'S RIGHTS AGAINST THE ENFORCEMENT OF A TAX AS PROVIDED BY N.C. GEN. STAT. § 105-267.

This case sprang up from criminal roots and evolved into a civil contest between moonshiners and revenuers clashing over the propriety of assessing an unauthorized substances tax on mash. In defense of his rights that the substance seized was slop or spent[6] mash, a nontaxable by-product of the whiskey making business, Petitioner took full advantage of each available procedural action proscribed by statute to challenge the tax liability, while passing through a gauntlet of illusory[7] forums. Out of this backdrop, Petitioner presents the following brief application of

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[6] *See Jones v. United States*, 357 U.S. 493, 494 (1958) "spent mash, a product resulting from the distilling of alcohol out of mash"). Also see affidavits of veteran ABC Officer Guy Lee, retired, and Junius P. Byrd, moonshiner. (Pet. App. 33,78).

[7] First, in an interdepartmental administrative hearing before the Secretary of Revenue - the assessor, collector and enforcer of the tax (Pet. App. 12); second, another interdepartmental administrative hearing on appeal to the Tax Review Board chaired by the State Treasurer - the keeper and spender of the tax *(see* note 3 *supra)*; third, summary judgment in the trial court without notice of hearing (*see* note 4 *supra)*; fourth, questionable affirmation by the North Carolina Court of Appeals (Pet. App. 1); and fifth, passed over by the North Carolina Supreme Court (Pet. App. 23).

state law to show how the North Carolina Court of Appeals snuffed out his right to a forum by passing over a few simple words - "as provided in N.C. Gen. Stat. § 105-267."

Since 1887, the Legislature of North Carolina granted taxpayers the statutory right to pay a tax under protest and sue for its recovery. *Duke v. State*, 247 N.C. 236, 239, 100 S.E.2d 506, 508 (1957); *Gulf Oil Corporation v. Clayton*, 267 N.C. 15, 20, 147 S.E.2d 522, 526 (1966); *Kirkpatrick v. Currie*, 250 N.C. 213, 215, 108 S.E.2d 209, 210 (1959). The current version of this more than a century old legislation is embodied in N.C. Gen. Stat. § 105-267. (Pet. App. 132). Simply by paying the tax and requesting a refund within the time frame of the statute will preserve a taxpayer's right to bring suit. *Coca-Cola Co. v. Coble*, 33 N.C. App. 124, 234 S.E.2d 477, *aff'd*, 293 N.C. 565, 569, 238 S.E.2d 780, 783 (1977).

In its simplest terms, a taxpayer proceeding under N.C. Gen. Stat. § 105-267 (Pet. App. 132) must comply with four procedural requirements in order to bring suit. First, pay the tax. Second, make a written demand on the Secretary for a refund of the tax paid within thirty days after payment. Third, allow the Secretary 90 days after the written demand to refund the tax. And fourth, file suit within three years after the expiration of the 90-day period allowed for making the refund. As to the first requirement, the record reflects that on 19 January 1999 the Department mailed the notice of tax assessment to Petitioner. (Pet. App. 106). The tax was considered paid within forty-eight hours of the 19 January 1999 proposed assessment (*see* note 2 *supra*), thereby satisfying the first requirement.

As to the second requirement, on 18 February 1999, Petitioner timely filed a letter protesting the tax assessment, requesting a hearing and demanding a refund.[8] Taking this action not only perfected Petitioner's right for obtaining an administrative review hearing before the Secretary pursuant to N.C. Gen. Stat. § 105-241.1(c), but it also preserved Petitioner's right to bring a civil action against the Secretary, thereby satisfying the second requirement. *See Coca-Cola Co.*, 293 N.C. at 569, 238 S.E.2d at 783. As to the third requirement, the Secretary's 90-day period for making a refund expired on 19 May 1999 (90 days after 18 February 1999), thereby satisfying the third requirement. And, as to the fourth requirement, suit must be brought within three years after 19 May 1999. On 17 May 2002, Petitioner filed an application and order extending time to file his complaint, and on that date, the Harnett County Clerk's Office entered an order allowing Petitioner to file his complaint up to and including 5 June 2002. (Pet. App. 70-71). On 5 June 2002, Petitioner filed his complaint, thus complying with the fourth requirement. (Pet. App. 44).

In affirming the trial court's entry of summary judgment, the North Carolina Court of Appeals did not evaluate N.C. Gen. Stat. § 105-241.4 as a "whole". By focusing solely on the language, "within 30 days after

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[8] *See* note 2 *supra*. Also, in the transcript of the hearing before the Assistant Secretary, both the Assistant Secretary and the Director of Unauthorized Substances Tax Division mutually acknowledge the hearing is in essence, a request for a refund" See excerpt from transcript of hearing, p. 9, lines 24-25; p. 10, line 1. (Pet. App. 85-86). And, on the first page of the Assistant Secretary's final decision, it plainly states that "the hearing is a request for a refund of the tax paid". (Pet. App. 13).

notification of the Board's decision ... bring a civil action", the other language, "as provided in N.C. Gen. Stat. § 105-267", becomes "meaningless". *Polaroid Corp. v. Offerman*, 349 N.C. 290, 507 S.E.2d 284 (1998). Moreover, the opinion of the North Carolina Court of Appeals only cites the first paragraph of N.C. Gen. Stat. § 105-267, and omits the language of the second paragraph that defines the time limit for bringing suit. (Pet. App.3-4). Omission of this vital language lends further support for the argument that the North Carolina Court of Appeals did not "evaluate the statute as a whole". Id. at 297, 507 S.E.2d at 290. Failure to construe N.C. Gen. Stat. § 105-241.4 in *pari materia* with N.C. Gen. Stat. § 105-267 runs against the grain of the canons of statutory construction, as well as the spirit of the statutes and the intent of the Legislature. Viewed in its entirety, N.C. Gen. Stat. § 105-241.4 does not appear to be ambiguous, but if there is any doubt as to its meaning, the statute should "be strictly construed against [Respondent] and in favor of [Petitioner]". *Stevenson v. City of Durham*, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972).[9]

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[9] It is to be observed that the opinion of the Court of Appeals is prefaced in oxymoronic or bittersweet language, *i.e.*, while noting that Petitioner filed suit pursuant to N.C. Gen. § 105-267 (Pet. App. 3), followed proper administrative procedure (Pet. App. 4) and properly filed notice of appeal (Pet. App. 8), the Court then holds that Petitioner did not timely file suit (Pet. App. 3,9), notwithstanding the 3-year time frame to file suit as set out in the second paragraph of N.C. Gen. Stat. § 105-267.

THIS CASE SERVES AS A TWO-PART VEHICLE FOR THIS COURT TO REVISIT AND REAFFIRM THE PRINCIPLES FOR ADJUDGING BOTH THE CONSTITUTIONALITY OF AN INFORMANT'S TIP UNDER THE-TOTALITY-OF-CIRCUMSTANCES APPROACH SET OUT IN *ILLINOIS V. GATES*, 462 U.S. 213, AND THE PLAIN VIEW DOCTRINE SET OUT IN *HORTON V. CALIFORNIA*, 496 U.S. 128 AND *ARIZONA V. HICKS*, 480 U.S. 321.

In light of the Court's long standing, deep seated respect for the sanctity of the home as pronounced in many of the Court's decisions, *Silverman v. United* States, 365 U.S. 505, 511 (1961); *Wyman v. James*, 400 U.S. 309, 316 (1971); *Payton v. New York*, 445 U.S. 573, 601 (1980); *Oliver v. United States*, 466 U.S. 170, 178-79 (1984), Petitioner presents his case to apprise the Court about facts that raise disturbing Fourth Amendment questions involving monetarily motivated agents who are statutorily driven on a revenue generating (*see* N.C. Gen. Stat. § 105-113.105 p. 3 *infra*) mission under color of law into the most intimate area of Petitioner's home - his bedroom, invoking not only the totality-of-circumstances approach for determining probable cause under *Illinois v. Gates*, 462 U.S. 213 (1983), but also the plain view principles set out in *Horton v. California*, 496 U.S. 128 (1990), and *Arizona v. Hicks*, 480 U.S. 321 (1987). As in most cases, the vital, threshold facts that may inspire a turn-a-bout in a court's decision vary, depending on the conveyer of the facts and the source of information. Without the benefit of any meaningful discovery, and surely no opportunity to depose the sole source of probable cause - the unidentified informant, Petitioner's fairest account of

the salient facts are intertwined below throughout his argument to the Court.

Officers obtained and simultaneously executed two search warrants on the same day, one at Clark's building, and the other at Petitioner's residence. (Pet. App. 100). Without question, ALE and officers who participated in the three-day round the clock surveillance of Clark's building possessed strong evidence that the building housed a distillery. Thus, the resulting search and seizure of the distillery is not a brow raising consequence. But, as to Petitioner's residence, a different scenario presents itself.

During the ongoing surveillance of Clark's building, an unidentified informant contacts agent Jaggers and advises that "they had been to the residence ... in the past 72 hours of the date and time listed on the warrant [15 January 1999] and they observed a quantity of non-tax paid alcohol in the residence. ... [T]hey knew the substance to be non-tax paid alcohol because they have used non-tax paid alcohol in the past. ... This [informant] is reliable to the affiant Jaggers because they have led the affiant Jaggers to at least five arrests for controlled substance violations in the past 12 months." (emphasis added)(Pet. App. 66). Since the tip does not mention or suggest any information that ties either Petitioner or the residence to the distillery, the timing of the tip with the concomitant ongoing surveillance appears to be harmless, just a mere coincidence or an unexpected stroke of good luck. But, as shown below, the manner

in which the tip is used - a ploy [10] to generate tax revenue (*see* N.C. Gen. Stat. § 105-113.105 p. 3 *infra*), deflates its initial appearance as being an untimely, unexpected lucky break.

As gleaned from agent Jagger's sworn attachments to his application for the search warrant, the tip does not identify the owner of the residence, how the informant came to be in the residence, the quantity of non-tax paid alcohol observed (*i.e.*, just a small amount, such as a drink, or a greater quantity, such as a case or more), how the non-tax paid alcohol was packaged, the location or particular area in the residence where the informant actually saw the non-tax paid alcohol, any trafficking of people in and out of the residence buying and selling non-tax paid liquor, any basis for establishing the informant's expertise[11] or

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[10] As to agent Jaggers's sworn statement that he received the tip within 72 hours of the date of the warrant (15 January 1999), it bears noting: p. 3 of the AL-49 report (Pet. App. _) reflects that "[o]n December 18, 1998 Supervisor J. V. Jackson received a call from the Harnett County Sheriff's Office Narcotics Division (HCSO). ... [advising] they had been using a confidential source of information (CSI) to purchase nontaxpaid alcoholic beverages from the home of [Petitioner] who lived on Bethel Baptist Road." Furthermore, HCSO told agent Jackson "their CSI had seen several gallons of nontaxpaid alcohol at Petitioner's residence but were told the distillery was not at Petitioner's residence but close by." (Pet. App. 96-97) Also, p. 4 of the AL-49 report reflects that on 15 January 1999 the HCSO "had obtained a warrant for [Petitioner's residence based on the sales of alcoholic beverages that had been made on previous dates." (Pet. App. 100).

[11] At the hearing before the Assistant Secretary of Revenue, Vance Jackson, a 27-year veteran ALE agent (excerpt from transcript of hearing, p. 31, lines 23-24)(Pet App. 93) and supervisor of the raid on the distillery at Clark's land, admitted that neither he nor the

ability to distinguish between alcohol that bears a tax stamp and alcohol that does not bear a tax stamp, and whether the informant actually tasted the substance in the residence or made any purchases of non-tax paid alcohol from the residence.[12] From this "commonsense" gleaning, the informant's overall basis of knowledge as a relevant consideration in the totality-of-circumstances analysis, *Illinois v. Gates, id.* at 230, leaves one with a pondering thought. Just what did the informant observe?

Furthermore, the use of the word "led", without more, does not persuasively connote on paper the veracity and reliability of the informant. Again, being mindful that veracity and reliability (like basis of knowledge) are only relevant considerations under the totality-of-circumstances analysis in *Illinois v. Gates, id.*, a magistrate would have to guess, assume and substitute his meaning for what he probably thought agent Jaggers meant by the word "led". To make such

---

State Lab could look at a container of non-tax paid alcohol and a container of tax paid alcohol and tell which was tax paid and which was non-tax paid. See excerpt from transcript of hearing, p. 65, lines 16-23. (Pet. App. 94-95).

[12] As to Ron Starling's (Director of Unauthorized Substances Division) verified answer to paragraph no. 28 of Petitioner's complaint, it bears noting: he denies the allegations pertaining to the informant's identity of the owner and residence, quantity of non-tax paid alcohol observed, the packaging. etc. (Pet. App. 37,51). But, at the hearing before the Assistant Secretary, he testifies that the informant had purchased non-tax paid alcoholic beverages from Petitioner's home and had seen several gallons of non-tax paid alcohol at Petitioner's home. (Pet. App. 82,83). Also *see* note 1 *supra* (admitting attachments to search warrant do not indicate any corroboration of informant's tip).

a speculative substitution stretches the Court's analysis of probable cause determination based on probabilities. *Id.* at 231).

Although the Court upheld the warrant to search the home and car in *Illinois v. Gates*, the Court held that "[u]nder the 'totality of the circumstances' analysis, corroboration of details of an informant's tip by independent police work is of significant value." *Id.* at 214. (*citing cf. Draper v. United States*, 358 U.S. 307). In this case, Respondent admits that agent Jaggers did not corroborate the informant's tip. (*See* note 1 *supra*). If, under *Illinois v. Gates*, independent corroboration by police work is of significant value, it goes to reason that no independent corroboration by police work is just as significant, if not more significant. *Id.*

In addition to the Fourth Amendment concerns surrounding the issuance of the search warrant, the search of Petitioner's residence raises even greater concerns under the plain view doctrine set out in *Horton v. California*, 496 U.S. 128 (1990) and *Arizona v. Hicks*, 480 U.S. 321 (1987). Just by its nature, moonshine, especially in an ongoing illicit liquor business, denotes bulk packaging, such as carboard boxes or cases of jugs of liquor, not just a fifth or pint bottle of liquor sold at an ABC store. Moreover, the officers who raided Petitioner's home were not like typical veteran ALE agents who cease their search after a search of a landowner's barn, storage building, etc does not reveal a distillery, moonshine, mash ingredients, etc. They were narcotics deputies, who generally, as their name implies, search all nooks and crannies, not leaving anything untouched or unturned.

After an extensive search of Petitioner's home did not uncover any illicit liquor (Pet. App. 68), the deputies did not just cease their search. They continued on into his bedroom, where they searched his closet and found a small, locked box. Under threat of forcing it open, Petitioner opened it, and they seized its contents - $37,200 in cash, contained in bank bags and some labeled mother-in-law's. (Pet. App. 68).

Under *Horton v. California*, the deputies have a difficult burden to overcome. When they discovered the locked box in the bedroom closet, the first question arising is whether it was "immediately apparent" to the deputies that the box contained contraband. *Id.* at 129. By its size, it would not hold a case or jug of non-tax alcohol, and there is no evidence that the box smelled of moonshine. Its outward appearancce did not suggest anything incriminating, but since it was locked, its unrevealing inner appearance did suggest that it contained something of value - cash or other valuables. But, since the warrant provided for the seizure of currency, maybe the deputies determined they had probable cause and did not need to rely on the plain-view principles for authority to seize the cash contents of the box. Maybe in a drug or similar case the argument would withstand a Fourth Amendment challenge, but not so in this case, and not under *Arizona v. Hicks*, 480 U.S. 321 (1987), which, even in plain view cases, requires probable cause, not reasonble suspicion to justify a seizure. Ironicallly, the deputies possess the evidence that indicates the cash was not "currency apparently ... received or derived from the sale or delivery of alcoholic beverages or other illegal activities." The property evidence card clearly shows

that the Sheriff's Department returned the balance of the seized cash to Petitioner (Pet. App. 113). If the cash was derived from some illegal activity, then why would the deputies return the balance to Petitioner - a difficult argument.
to overcome.

CONCLUSION

In no other case is the plight of a taxpayer more revealing than in this case that is being respectfully presented to this Honorable Court on writ of certiorari. For more than six years, Petitioner has endured one Departmental challenge after another, only to have his case dismissed on the day of trial by a non-calendared motion for summary judgment. Just as the bedroom closet represented the last vestibule of monetary hope for the officers, this Court represents the last stand for Petitioner, except he is on a different mission – a mission to protect the rights of us all, and a forum to guarantee that protection.

Respectfully submitted,

/s/

Thomas Edward Hodges
Attorney at Law
P. O. Box 697
Benson, NC 27504
(919) 894-2603

Counsel for Petitioner

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NO. COA03-1183
NORTH CAROLINA COURT OF APPEALS
Filed: 7 September 2004

[ENTERED: SEPTEMBER 7, 2004]

DELMON LEE, JR.,

Plaintiff-appellant,

v. Harnett County No 0 2 CVS 975

E. NORRIS TOLSON, in his official capacity as the SECRETARY of the N.C. DEPARTMENT OF REVENUE,
Defendant-appellee.

LARRY FITCH CLARK, SR.,

Plaintiff-appellant,

Harnett County No. 02 CVS 976

E. NORRIS TOLSON, in his, official capacity as the, SECRETARY of the N.C.; DEPARTMENT OF REVENUE)

Defendant-appellee

Appeal by plaintiffs from judgment entered by Judge Wiley F. Bowen in Harnett County Superior Court. Heard in the Court of Appeals 9 June 2 004.

Thomas Edward Hodges for the plaintiffs-appellants.

Attorney General *Roy Cooper, by Assistant Attorney General Alexandra M. Hightower for the defendant-appellee Secretary of Revenue.*

ELMORE, Judge.

On 15 January 1999, Alcohol Law Enforcement (ALE) and the Harnett County Sheriff's Department obtained search warrants and simultaneously conducted a raid on a distillery located on lands of Larry Fitch Clark, Sr. (Clark) and a raid on the residence of Delmon Lee, Jr. (Lee) . The raids resulted in the seizure of a distillery, 1,552 gallons of moonshine and 9,485 gallons of mash from Clark's property, and $37,200.00 in cash from Lee's residence.

The Secretary of Revenue (Secretary) prepared a warrant for collection of taxes against Clark and Lee, with a total tax indebtedness of $35,420.42, including penalties and interest. The warrant was executed by levying on seized cash in the custody of the Harnett County Sheriff's Department in the amount of $35,420.42. Because the assessment was paid within 48 hours of possession, the penalties and interest were eliminated, and a sum of $5,194.00 was returned to Lee.

Lee and Clark mailed letters protesting the assessment of taxes against them to the Secretary. A hearing was held by the Assistant Secretary, and the tax assessment was upheld. Plaintiffs filed for administrative review before the Tax Review Board. The Tax Review Board confirmed the Assistant

Secretary's decision. Plaintiffs then filed suit in Harnett County Superior Court pursuant to N.C. Gen. Stat. § 105-267. The trial court granted Defendant Secretary's motion for summary judgment. From that order granting summary judgment, plaintiffs appeal.

As a preliminary issue, we must first address whether plaintiffs-appellants timely filed the appeal, and whether they timely filed suit in the superior court. We hold that suit was not timely brought in the lower court, and consequently, summary judgment was appropriate.

Our General Statutes clearly define the time limits relevant to this case. The process for protesting a levied tax is outlined in N.C. Gen. Stat. § 105-267 (2003):

> No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this Subchapter. Whenever a person has a valid defense to the enforcement of the collection of a tax, the person shall pay the tax to the proper officer, and that payment shall be without prejudice to any defense of rights the person may have regarding the tax. At any time within the applicable protest period, the taxpayer may demand a refund of the tax paid in writing from the Secretary and if the tax is not refunded within 90 days thereafter, may sue the Secretary in the courts of the State for the

> amount demanded. The protest period for a tax levied in Article 2A, 2C, or 2D of this Chapter is 30 days after payment. The protest period for all other taxes is three years after payment.

N.C. Gen. Stat. § 105-267 (2003). We note that unauthorized substances taxes are levied under article 2D.

Plaintiffs here followed proper procedure as it pertained to the administrative process. Once that process was exhausted, in this case not in their favor, they had the option to bring suit in the courts of this State within a prescribed time period.
N.C. Gen. Stat. § 105-241.4 (2003) governs actions to recover taxes paid:

> Within 30 days after notification of the Secretary's decision with respect to liability under this Subchapter or Subchapter V, any taxpayer aggrieved thereby, in lieu of petitioning for administrative review thereof by the Tax Review Board under G.S. 105-241.2, may pay the tax and bring a civil action for its recovery as provided in G.S. 105-267.
> Any taxpayer who has obtained an administrative review by the Tax Review Board as provided by G.S. 105-241.2 and who is aggrieved by the decision of the Board may, in lieu of appealing pursuant to the provisions of G.S. 105-241.3, within 30 days after notification of the Board's

> decision with respect to liability pay the tax and bring a civil action for its recovery as provided in G.S. 105-267. Either party may appeal to the appellate division from the judgment of the superior court under the rules and regulations prescribed by law for appeals, except that if the Secretary appeals, the Secretary is not required to give any undertaking or make any deposit to secure the cost of the appeal....

N.C. Gen. Stat. § 105-241.4 (2003).

N.C. Gen. Stat. § 105-266.1 (2003) governs refunds of overpayment of taxes, and plaintiffs argue that this is the basis for their appeal:

> (a) If a taxpayer claims that a tax or an additional tax paid by the taxpayer was excessive or incorrect, the taxpayer may apply to the Secretary for refund of the tax or additional tax at any time within the period set by the statute of limitations in G.S. 105-.266.
>
> ...
>
> (c) **Within 90 days after notification of the Secretary's decision with respect to a demand for refund of any tax or additional tax under this section, an aggrieved taxpayer may, instead of petitioning for administrative review by the Tax Review Board under G.S. 105-241.2, bring a civil action against the Secretary for recovery of the alleged**

> **overpayment.** If the alleged overpayment is more than two hundred dollars ($ 200.00), the taxpayer may bring the action either in the Superior Court of Wake County or in the superior court of the county in which the taxpayer resides; .... If upon trial it is determined that there has been an overpayment of tax or additional tax, judgment shall be rendered therefore, with interest, and the State shall refund the amount due.
>
> (d) Either party may appeal to the appellate division from the judgment of the superior court under the rules and regulations prescribed by law for appeals, except that the Secretary, if he should appeal, shall not be required to give any undertaking or make any deposit to secure the cost of such appeal.
>
> (e) Nothing in this section shall be construed to conflict with or supersede the provisions of G.S. 105-241.2, and, with respect to tax paid to the Secretary of Revenue, the rights granted by this section are in addition to the rights provided by G.S. 105-267.

N.C. Gen. Stat. § 105-266.1 (2003) (emphasis added).

> The rules and regulations prescribed for taking the appeal are embodied in our Rules of Appellate

Procedure. N.C.R. App. P. 3(c) (2004) governs the time for taking appeals:

> In civil actions and special proceedings, a party must file and serve a notice of appeal:
>
> (1) within 30 days after entry of judgment if the party has, been served with a copy of the judgment within the three-day period prescribed by Rule 58 of the Rules of Civil Procedure; or
>
> (2) within 30 days after service upon the party of a copy of the judgment if service was not made within that three-day period; provided that
>
> (3) "if a timely motion is made by any party for relief under Rules 50 (b), 52(b) or 59 of the Rules of Civil Procedure, the 30-day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order or its untimely service upon the party, as provided in subsections (1) and (2) of this subdivision (c)...

N.C.R. App. P. 3(c) (2004) (emphasis added).

In the case at bar, the total tax of $35,420.42 was assessed on 19 January 1999. Plaintiffs paid within 48 hours, avoiding thereby penalty and interest. On 18

February 1999, plaintiffs mailed their protest letters to the Secretary of Revenue. On 23 July 1999, the Assistant Secretary held the administrative tax hearing. A final decision dated 10 April 2000 was rendered which denied plaintiffs' request for a refund. Plaintiffs filed notice of intent to petition for administrative review to the Tax Review Board on 9 May 2000, and filed the petition for review on 10 July 2000.The hearing before the Review Board was held on 15 August 2001. The Board rendered a decision affirming the Assistant Secretary's decision on 9 November 2001.

Plaintiffs filed a petition to extend time to file their civil complaint on 17 May 2002, which was granted extending the time to file until 5 June 2002. The petition was filed over six months after the Board's decision was rendered. Under any of the above statutes, when this petition was filed, the time limit to file had already expired. Plaintiffs filed their complaint on 5 June 2002. Defendant filed a motion for Summary Judgment, which was granted in an order entered 19 February 2003. Plaintiffs' notice of appeal was filed properly on 11 March 2003.

The order which granted an extension of time to file suit could not effectively extend the time limit because it had already expired before a motion was made. See, *e.g., Reap v. City* of *Albemarle,* 16 N.C. App. 171, 191 S.E.2d 373 (1972) (ruling that after the time for docketing the record on appeal in this Court had expired, the trial judge could not then enter a valid order extending the time).

In some cases, this Court will entertain an untimely appeal by granting a writ of certiorari under Rule App. P. 21(a). This rule says that when the right to appeal has been lost by a party because they did not take timely action, the court has discretion to grant a writ of certiorari. However, this rules does not apply because the parties in this case lost the right to appeal by not taking action at the superior court level, and not by failing to timely file with this court. It would not be just to apply it, since summary judgment was justified by these aforementioned procedural grounds, and that summary judgment was timely appealed to this Court. Therefore, we cannot now invoke jurisdiction for the superior court which that court could not itself invoke. Summary judgment was properly granted because of the expired time limit for bringing suit.

We affirm the summary judgment on the grounds that the plaintiff did not timely bring suit in the trial court. Because this issue is dispositive, we do not reach the plaintiffs' remaining assignments of error.

Affirmed.

Judges McGEE and McCULLOUGH concur.

STATE OF NORTH CAROLINA
COUNTY OF HARNETT
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION 02-CVS-00975

[ENTERED FEBRUARY 10, 2003]

DELMON LEE, JR.	)	
	)	**ORDER GRANTING**
	)	**DEFENDANT'S MOTION**
Plaintiff,	)	**FOR SUMMARY**
	)	**JUDGMENT**
	)	
v.	)	
	)	
E. NORRIS TOLSON, in his official capacity as the SECRETARY of the N.C. DEPARTMENT OF REVENUE,	)	
	)	
Defendant.	)	

THIS MATTER HAVING COME ON FOR HEARING before The Honorable Wiley F. Bowen. Judge Presiding, at the 13 January 2003 Civil Session of Harnett County Superior Court, on defendant's motion for summary judgment.

AND THE COURT HAVING REVIEWED the pleadings, affidavits and exhibits, requests for admissions and other matters of record, and having

heard the arguments of counsel:

AND IT FURTHER APPEARING that there are no genuine issues as to any material fact and that defendant is entitled to judgment as a matter of law;

IT IS THEREFORE ORDERED that defendant's motion for summary judgment is allowed.

This the 10 day of February 2003.

/s/
Wiley F. Bowen
Superior Court Judge Presiding

FINAL DECISION Docket 99-62
TAXPAYER: Delmon Lee. Jr. Page 1
AN 250066

[ENTERED APRIL 10, 2000]

IN THE MATTER OF:

The **Proposed** Assessment of Unauthorized Substance Tax dated January 19, 1999 by the Secretary of Revenue of the State of North Carolina

against

Delmon Lee, Jr., Taxpayer

This matter was heard before the Assistant Secretary of Revenue, Michael A. Hannah, in the city of Raleigh on July 23, 1999, upon timely application for an Administrative Tax Hearing by the Taxpayer, who objected to the assessment of unauthorized substance tax, penalty and interest issued on January 19, 1999. The hearing was held by the Assistant Secretary under the provisions of G.S. 105-260.1. The following persons, in addition to the Assistant Secretary, were present at the hearing: the Taxpayer, codefendant Larry Fitch Clark, and their attorney, Mr. Thomas Hodges of Benson, NC; Ron Starling, Director of the Unauthorized Substances Tax Division; T.A. Humphrey, Administrative Officer of the Unauthorized Substances Tax Division; Vance Jackson and John Adorjan of the Division of Alcohol Law Enforcement and Wes Nipper of Wake County ABC Law Enforcement.

Pursuant to G.S. 105-113. lll(a) and G.S. 105-241.1, a Notice of Unauthorized Substance Tax Assessment was issued to the Taxpayer by J.S. Powell, Enforcement Officer of the Unauthorized Substances Tax Division, assessing $32,006.40 tax, $3,200.64 penalty, and $213.38 interest, for a total proposed liability of $35,420.42. The assessment was based upon information contained in Form BD-4L, "Report of Arrest and/or Seizure Involving Nontaxpaid (Unstamped) Illicit Liquor," which was prepared by the Harnett County Sheriffs Office on January 15, 1999. The assessment alleged that on January 15,1999, the Taxpayer possessed 9,485 gallons of Mash and 1,552 gallons of moonshine without the proper tax stamps affixed.

The tax was paid in full within forty-eight (48) hours of possession, therefore no penalty or interest is due. This hearing is a request for a refund of the tax paid.

ISSUES

1. Did the Taxpayer have actual or constructive possession of 9,485 gallons of mash and 1,552 gallons of moonshine?

2. Is **the** Taxpayer subject to the assessment of unauthorized substance tax?

EVIDENCE

The Unauthorized Substances Tax Division offered into evidence a "Brief for Tax Hearing" with the

following attachments:

US-1 Letter to the Taxpayer's attorney, dated March 1, 1999, advising him that his client's Administrative Tax Hearing is scheduled for May 6, 1999.

US-2 Letter from the Taxpayer's attorney, dated February 18, 1999, requesting a hearing.

US-3 Form BD-4L, "Report of Arrest and/or Seizure Involving Nontaxpaid (Unstamped)
Illicit Liquor," dated January 15, 1999, which names the Taxpayer as the possessor of the unauthorized substances.

US-4 Form BD-10, Notice of Unauthorized Substance Tax Assessment, dated January 19, 1999.

US-5 Department of Crime Control and Public Safety, Alcohol Law Enforcement's arrest narrative dated January 21, 1999.

US-6 Memorandum from Muriel K. Offerman, Secretary of Revenue, dated April 18, 1996, delegating to Michael A. Hannah, Assistant Secretary for Legal & Administrative Services, the authority to hold any hearing required or allowed under Chapter 105 of the North Carolina General Statutes.

US-7 Signed affidavit from Ron Starling, Director of the Unauthorized Substances Tax
Division, stating that no record could be found that the Taxpayer had made application for illicit liquor stamps or paid the tax.

The brief was accepted into the record and a copy provided to attorney Hodges. Mr. Hodges' only objection was to the quantity of mash referenced in the brief since that was the Taxpayer's primary objection to the assessment.

The Taxpayer's attorney submitted the following items which were accepted into the record:

T-l Enforcement Agent J.S. Powell's tax warrant for collection of money seized by the Harnett County Sheriffs Department.

T-2 Forms AL-50, ALE's property report.

T-3 Copy of the N.C.G.S. **105-113.106(6a),** definition of mash.

T-4 A description and flow chart of the process of making liquor.

T-5 A calculation of the Taxpayer's contention as to the quantity of mash.

T-6 Drawings and computations prepared by Massengill Associates, P.A., a consulting engineering firm located in Benson, North Carolina, dated July 22, 1999.

In addition to the documentary evidence, the Assistant Secretary heard testimony from Supervisory Agent Vance Jackson and Agent John Adorjan of the Division of Alcohol Law Enforcement.

Agent Adorjan testified that he helped conduct surveillance of the distillery site on Clark's property and took photographs of the taxpayers at the site in the days leading up to the raid. The pictures were examined at the hearing by all parties and photocopies of them were entered into the record at the Department's request. Adorjan stated that he saw the Taxpayer arrive at one point during the surveillance and that he helped Larry Clark rearrange a load of gallon jugs of nontaxpaid liquor in the back of a U-Haul trailer. Adorjan further testified that during execution of the search warrant, he measured the amount of mash in four cookers, known as "440's," and in eight chemical vats, known as "1550's," all of which were located in the out building that housed the distillery. The cookers measured 48" by 96", with three holding mash at a depth of 23" and the fourth only half full at 12". The amount of mash in the 1550's was determined by using the lowest manufacturer's volume indicator below the actual level of mash. Adorjan testified that all of the liquor and mash was destroyed except for two gallons of illicit liquor and approximately one-half gallon of mash. The mash sample was taken from a single tank. All of the retained evidence was stored in Agent Adorjan's evidence locker to which only he has access.

Supervisory Agent Vance Jackson, an ALE veteran with twenty-seven years experience, testified as to the nature of the contents of the 1550's. He stated that he examined the contents of each tank and that the contents were bubbling, or "working", which indicated the presence of sugar and the act of fermentation. Under questioning from Taxpayer's attorney, Thomas

Hodges, Jackson defined "slop" as spent mash, or mash that has already had the alcohol cooked out of it. However, he said that spent mash could still be fermentable since you cannot boil all the alcohol out of mash. Jackson also testified that he had never known slop to be pumped back into the cookers. Finally, Jackson testified that the Taxpayer stated that, "The place hadn't even turned a profit yet— the nails are barely set in the wood."

Attorney Thomas Hodges argued that the mixture found in the 1550's was slop, or spent mash, that had already fermented and been used to make a batch of liquor. He argued that the spent nature of the mixture meant that it no longer met the definition of mash in G.S. 105-113.106(6a) and therefore was not subject to the unauthorized substance tax. He did not offer any evidence or arguments to show that the substance in the cookers (the 440's) was not mash or that the Taxpayer was not in possession.

Each side was granted time by the Assistant Secretary to submit additional evidence after the July 23 hearing. On August 18,1999, Mr. Hodges submitted an affidavit from Junius P. "Junior" Byrd, a resident of Johnston County with over 50 years experience producing nontaxpaid alcohol. Mr. Byrd's affidavit describes the process of making moonshine, with particular emphasis on the inability of "slop" to ferment and produce a second batch of liquor. Mr. Byrd did not claim to have examined the contents of the Taxpayer's tanks nor did he specifically comment on whether it was slop or mash.

On November 18, 1999, the Department submitted a crime lab report from the S.B.I, for samples seized during the search of the Clark property. ALE Agent Adorjan testified in error on July 23, 1999, that he had already submitted the samples in this case to the SBI for analysis. He realized after the hearing that he had not. and sent the samples to the S.B.I, on August 23. The analysis revealed that two plastic bottles containing clear liquid contained 44% alcohol by volume and a plastic bottle of light brown liquid contained 10% alcohol by volume. A copy of the report was forwarded to Mr. Hodges.

FINDINGS OF FACT

Based upon the foregoing evidence of record, the Assistant Secretary makes the following findings of fact:

1. Assessment of Unauthorized Substance Tax was made against the Taxpayer on January 19, 1999, in the sum of $32,006.40 tax, $3,200.64 penalty and $213.38 interest, for a total of $35,420.42, based upon possession of 9,485 gallons of mash and 1,552 gallons of moonshine.

2. The principal amount of tax was paid in full within forty-eight (48) hours of possession.

3. The Taxpayer made timely objection and application for a hearing.

4. The material found in the "440" cookers and the "1550" plastic containers at the time of seizure was

"mash" as that term is defined by G.S. 105-113.106(6a).
5. On January 15, 1999, the Taxpayer was in possession of 9,485 gallons of mash and 1,552 gallons of moonshine.

6. There were no tax stamps affixed to the mash or moonshine as required by law.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Assistant Secretary makes the following conclusions of law:

1. The Taxpayer had unauthorized possession of 9,485 gallons of mash and 1,552 gallons of moonshine on January 15, 1999, and was therefore a dealer as that term is defined in G.S. 105-113.106.

2. The Taxpayer is liable for tax in the sum of $32,006.40, a sum which was paid within forty-eight (48) hours of possession and therefore not subject to penalty or interest.

DECISION

At the administrative tax hearing, the Taxpayer argued that the unauthorized substance tax should not be assessed against the mixture found in the large, open plastic containers, commonly called "1550's," located at the distillery because it was not "mash" as defined in N.C.G.S. 105-113.106. The Taxpayer's argument is based upon his contention that the mixture in the containers was not fermentable because

the alcohol had already been removed from it. Therefore, the argument continues, the mixture in the containers was the end product of the process, commonly called "slop", which is mash after the alcohol has been removed and because slop is not mash, no tax should be assessed against the 7,885 gallons of that mixture contained in the 1550's. The Taxpayer did not dispute that the 1,600 gallons of material contained in the four cooker's, known as "440's," was mash.

Subsequent to the hearing, the Taxpayer submitted, in support of its contention, an affidavit from Mr. Junius P. Byrd, a self professed and apparently well known expert in the field of making "moonshine" with an admitted fifty years of experience in this craft. The purpose of Mr. Byrd's affidavit, according the Taxpayer, was to show that the by-product of the liquor making process, slop, is not fermentable and cannot be used by itself to make additional liquor. According to the affidavit of Mr. Byrd, even a veteran agent of the North Carolina ALE would not be able to distinguish the very subtle differences between mash and slop, because they look and smell alike, and only those with many years of moonshine making experience would be able to make such a determination.

At the hearing, the Division presented a witness, Vance Jackson, an ALE agent whose varied experience in enforcing the spirituous liquor laws of North Carolina covers many years, including a substantial stint undercover actually assisting with the moonshine production process. Agent Jackson testified that he personally examined the mixture in question located in

the 1550's and the 440 's, and, based upon his considerable knowledge, extensive training and years of experience, arrived at the conclusion that the mixture in both types of containers was in fact mash.

While interesting, the affidavit of Mr. Byrd was based solely upon his general knowledge of the fermentation and distillation process which, while certainly recognized as significant as evidenced by his experience, did not include a personal examination of the mixture in question. Clearly, Agent Jackson was in a better position than Mr. Byrd to make a proper determination of whether the mixture was mash or slop. Agent Jackson testified that he personally observed the substance "bubbling" in each tank and concluded that the substance was mash. In addition, the SBI analysis of the samples submitted by ALE Agent Adorjan revealed significant levels of alcohol. The Taxpayer did not have an independent chemical analysis of the mixture performed and Agent Jackson's testimony is very credible. Accordingly, I must reject the argument of the Taxpayer that the 7,885 gallons of mixture in the 1550's was not mash.

Wherefore, the assessment based on Taxpayer's possession of 9,485 gallons of mash and 1,552 gallons of moonshine is deemed to be proper under the law and the facts, is sustained, and the Taxpayer's request for a refund of the $32,006.40 previously paid was properly denied.

This the 10th day of April, 2000.

/s/

Michael A. Hannah
Assistant Secretary of Revenue

No. 527P04 ELEVEN-A DISTRICT

SUPREME COURT OF NORTH CAROLINA
(Lee v Tolson, et al)
[ENTERED DECEMBER 2, 2004]

DELMON LEE, JR.
v
E. NORRIS TOLSON, in his official capacity as the SECRETARY of the N.C. DEPARTMENT OF REVENUE

LARRY FITCH CLARK, SR.
v.
E. NORRIS TOLSON, in his official capacity as the SECRETARY of the N.C.DEPARTMENT OF REVENUE

From NC Court of Appeals
(COA03-1183)
From Harnett
(02CVS975, 976)

ORDER

Upon consideration of the petition filed on the 12th day of October 2004 by Plaintiffs (Lee and Clark) in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 2nd day of December 2004.

s/ Brady, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 8th day of December 2004.

Christie Speir Cameron
Clerk, Supreme Court of North Carolina
Shaula A. Brannan
Assistant Clerk

Copy to:
North Carolina Court of Appeals
Mr. Ralph A. White, Appellate Reporter (By E-Mail)
Mr. Thomas Edward Hodges, Attorney at Law, For Lee and Clark
Mr. Michael D. Youth, Assistant Attorney General, For Tolson (by E-Mail)
West Publishing Company (By E-mail)
Lexis-Nexis (By E-mail)
LOIS Law (By E-mail)

NO. _____ ELEVENTH DISTRICT
NORTH CAROLINA COURT OF APPEALS

DELMON LEE JR.,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	From Harriett County
	)	02 CVS 975
E. NORRIS TOLSON,	)	
Secretary of Revenue,	)	
	)	
Defendant-Appellee.	)	
	)	
LARRY FITCH	)	
CLARK, SR. ,	)	
	)	
Plaintiff-Appellant,	)	
	)	
vs.	)	From Harnett County
	)	02 CVS 97 6
E. NORRIS TOLSON,	)	
Secretary of Revenue,	)	
	)	
Defendant-Appellee.	)	

STATEMENT OF ORGANIZATION OF TRIAL TRIBUNAL

This is an appeal from the entry of Orders granting Defendant's Motion for Summary Judgment against Plaintiff Lee and Plaintiff Clark filed February 19, 2003. Upon entry of said Orders, the Plaintiffs gave Joint Notice of Appeal to the North Carolina Court of

Appeals filed on March 11, 2003. (Filed and docketed in the North Carolina Court of Appeals on 9-9-03 and 9-12-03, respectively.)

STIPULATIONS AS TO RECORD ON APPEAL

It is stipulated and agreed between the parties as follows:

1. All documents contained in the Record on Appeal were properly and timely filed, served and signed.

2. The Notice of Appeal was properly and timely given by Plaintiffs-Appellants.

3. The January 13, 2003 Civil Session of Harnett County Superior Court was duly organized and held, and the Court has jurisdiction over the parties and the subject matter.

4. The two final decisions rendered 4/10/00 by the Assistant Secretary of Revenue in the administrative tax hearing held 7/23/99 are identical, and therefore, only one decision will be entered into the Record on Appeal.

5. Defendant-Appellee neither calendared his motion for summary judgment for hearing nor provided Plaintiffs-Appellants with notice of hearing.

6. The case captions and certificates of service attached to the pleadings in this action are not necessary to an understanding of the issues raised by this appeal and may be omitted from the record. The Clerk of the Court of Appeals may simply indicate the date on which each document
was filed and the date on which each document was signed.

This the 9th day of September, 2003

/s/
Thomas Edward Hodges
P.O. Box 697
Benson, NC 27504
919-894-2603
Attorney for Plaintiffs-Appellants

/s/
Roy Cooper, Attorney General
Alexandra M. Hightower
Assistant Attorney General
P.O. Box 62 9
Raleigh, NC 27602-6550
919-755-6550
Attorneys for Defendant-Appellee

STATEMENT OF RECORD ITEMS SHOWING JURISDICTION

It is stipulated and agreed between counsel for the parties that Summons were properly issued and served in this matter and the Court had jurisdiction of the parties.

NORTH CAROLINA HARNETT COUNTY

IN THE GENERAL COURT OF
JUSTICE SUPERIOR COURT DIVISION
FILE NO. 02 CVS OO975
FILE NO. 02 CVS 00976

DELMON LEE JR. and LARRY FITCH CLARK, SR.	)	
Plaintiffs,	)	NOTICE OF APPEAL
vs.	)	
E. NORRIS TOLSON, Secretary of Revenue,	)	
Defendant.	)	

TO THE HONORABLE COURT OF APPEALS OF NORTH CAROLINA:

Pursuant to Rule 3 and Rule 5 of the North Carolina Rules of Appellate Procedure, Plaintiffs Delmon Lee Jr. and Larry Fitch Clark, Sr. jointly give notice of appeal to the North Carolina Court of Appeal from the Orders Granting Defendant's Motions for Summary Judgment entered in the above entitled cases on February 10, 2003 by the

Honorable Wiley F. Bowen and filed on February 19, 2003 in the Office of the Harnett County Clerk of Superior Court.

Respectfully submitted this 11th day of March, 2003.

/s/

Thomas Edward Hodges
Attorney for Plaintiffs
Delmon Lee Jr.
Larry Fitch Clark, Sr.
P. O. Box 697
Benson, NC 27504
(919) 894-2603

Lee v. Tolson; Clark v. Tolson
Harnett County File No. 02 CVS 975; 02 CVS 976

Argument by Ms. Hightower **Page 3**

I believe Mr. Hodges has also made the argument that, under the exclusionary rule that there is an exclusionary rule that should apply in this case and in the matter of the search and seizure of money from, I think it's Mr. Lee's house, and in this matter the exclusionary rule doesn't apply in civil matters.

And, since the Plaintiff pled guilty to manufacture and possession of alcohol, they lost their opportunity to make that argument in criminal court, which is where it should have been made.

Finally, I won't go into too much about the trial by jury, but there are two ways in which a tax payer can contest a tax, and the Plaintiffs in this case have chosen to go to the route of a Secretary's Hearing Tax Review board. And now, if they're heard in Superior Court, it should be under 150-D, which is the Administrative Procedures Act, rather than by jury.

MR. HODGES: Your Honor, before I get into my argument, I'd just like to say to the Court that I have not received any notes whatsoever that the matter was being calendared for summary judgment motion. I just

THE COURT: You didn't receive a notice for the motion for summary judgment?

MR. HODGES: I received a motion January the 3rd, the

Friday after New Year's day, Your Honor, and then this past week I believe

THE COURT: You also received a copy of the calendar that shows the case is on the calendar for trial.

MR. HODGES: Yes, sir.

THE COURT: Okay.

MR. HODGES: I received that but not a notice as to the motion.

THE COURT: All right.

MR. HODGES: Your Honor, as to Plaintiff's argument that we must prove some type of exemption that what we contend to be slop was spent mash is not a taxable item under the North Carolina tax laws.

We have presented two affidavits. Fortunately, I was able to get these from law enforcement officers, and I have presented them this date, Your Honor. Because I have not had the opportunity to be heard on this, I did not have the opportunity to present them two days before, and I have these affidavits before me,

Your Honor.

If I may present to the Court. I have not heard any objection to the contrary.

MS. HIGHTOWER: Your Honor, move to strike because we did not get them two days before, as Mr. Hodges said.

THE COURT: Let me see the affidavits.

NORTH CAROLINA

AFFIDAVIT

JOHNSTON COUNTY

GUY LEE , being first duly sworn, deposes and says:

My name is Guy Lee and I reside at 2172 Buffalo Road. Smithfield, North Carolina 27577. For twenty-eight (28) years. I worked as an officer with the Johnston County ABC. As part of my duties, I personally investigated and participated in raids on numerous illegal distilleries in North Carolina. During my employment as an ABC officer, I gained many years of hands on experience and a working knowledge relating to the manufacture of illegal liquor, including how to set up a distillery, the ingredients needed to make fermentable mash or beer, as well as familiarity with the language and usage of trade terms as spoken by moonshiners.

In the moonshine business, the term "mash" is considered to be that mixture of various ingredients, such as water, wheat bran and sugar which, after fermenting, becomes *beer*. The beer is then poured into a cooker where it is run or distilled into alcohol. After the distilled alcohol reaches a certain proof, the run or distillery process is stopped. The brownish, liquid substance remaining in the cooker after it has been run is referred to by moonshiners as "slop" or "spent mash". The "slop" or "spent mash" is no longer capable of fermenting into beer, and it is usually discarded. It may be pumped out directly onto the ground or pumped through an underground pipe that empties into a stream, pond, hog parlor or other inconspicuous

place to avoid detection. Sometimes it may be pumped into barrels and plastic containers and saved to be used to make another batch of mash, which requires adding more water, wheat bran and sugar in order-to make it ferment and make beer.

"Slop" or "spent mash" will contain a certain amount of alcohol in it. The amount or percentage of alcohol remaining in the "slop" or "spent mash" will depend upon how long the beer is run. The longer the beer is run. the lower the percentage of alcohol will be in the "slop" or "spent, mash." Likewise, the shorter the run. the higher the percentage of. alcohol will be in the "slop" or "spent mash". Notwithstanding, from a law en forcement perspective, "slop" or "spent mash" is not taxed because it is no longer capable of fermenting and becoming beer for distilling alcohol. To the average person, it is usually difficult to distinguish between fermentable mash (beer) and "slop" or "spent mash", as they both appear to smell and look the same. Other than the moonshiner who is actually operating the distillery, it takes a close inspection and examination by a person with acquired knowledge and experience to determine whether the substance in a particular container is mash (beer) or simply "slop" or "spent mash". A chemical analysis may be made of each container of mixture to determine the percentage of alcohol in each container. But, standing alone, the analysis may not always be a true indicator, because as noted above, a snorter run will result in a higher percentage of alcohol as compared to a longer run. Other factors to be considered is the presence of mash ingredients, such as sugar and wheat bran. The presence of these ingredients might suggest or indicate

and on going process of making mash. Similarly the presence of numerous jugs of alcohol and a lack of mash ingredients may indicate that the mash (beer) had already been run into alcohol.

This the 24th day of December, 2002.

/s/
GUY LEE

NORTH CAROLINA
COUNTY OF HARNETT

I, Doris Lee Hodges, a Notary Public in and for said County and State, do hereby certify that GUY LEE personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

WITNESS my hand and notarial seal this the 24th day of December, 2002 .

/s/
NOTARY PUBLIC

My commission expires: 3-28-05

STATE OF NORTH CAROLINA
COUNTY OF HARNETT

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
02-CVS-975

DELMON LEE, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	VERIFIED
	)	ANSWER
E. NORRIS TOLSON,	)	
SECRETARY OF	)	
REVENUE	)	
	)	
Defendant.	)	

Defendant, E. Norris Tolson, Secretary of Revenue alleges and says that:

1. Answering Paragraph 1, it is admitted that plaintiff brings suit, taxes were assessed upon "mash" as required by Article 2D of Chapter 105 of the General Statutes, and gallons of "mash" were seized from a building owned by plaintiff Larry Fitch Clark. Sr. Except as admitted herein. Paragraph 1 is denied.

2. Answering Paragraph 2, it is admitted that plaintiff brings an action, purportedly pursuant to the United States and North Carolina Constitutions. Except as admitted herein, paragraph 2 is denied.

3. Paragraph 3 is admitted.

4. Paragraph 4 is admitted.

5. Paragraph 5 is not denied

6-13. Paragraphs 6-13 are admitted.

14. Answering Paragraph 14, it is not denied that "slop" or "spent mash" may be slang for a by product or product of a distillery. The remaining assertions of Paragraph 14 are denied.

15. Answering Paragraph 15, it is admitted that the General Statutes do not define "slop" or "spent mash." Except as admitted herein, Paragraph 15 is denied.

16. Paragraph 16 is denied.

17-22. Paragraphs 17-22 are admitted.

23. Paragraph 23 is denied.

24. All of defendant's responses to Paragraphs number 1 through 23 are incorporated herein by reference.

25. Paragraph 25 is admitted.

26. Paragraph 26 is admitted.

27. Paragraph 27 is admitted.

28. Answering Paragraph 28, defendant lacks knowledge sufficient to form a belief, therefore denies same.

29. Paragraph 29 is admitted.

30. Paragraph 30 is admitted.

31-33. Answering Paragraphs 31 through 33. defendant lacks knowledge sufficient to form a belief, therefore denies same.

34. Paragraph 34 is admitted.

35. Paragraph 35 is denied.

36. Paragraph 36 is admitted.

37. Answering Paragraph 37, defendant lacks knowledge sufficient to form a belief, therefore denies same.

38. Answering Paragraph 38, defendant lacks knowledge sufficient to form a belief, therefore

denies same, [it must be noted, the "inventory of seized property" shows that two plastic jugs were recovered from plaintiffs home. Such jugs are used in the non-tax paid alcohol trade, and may have contained non-tax paid liquor.]

39-42. Paragraphs 39 through 42 are denied.

FURTHER ANSWER

1. Plaintiffs lawsuit depends upon the theory that there exists an exception or exemption from tax for "spent mash" or "slop," or that the court will create such a statutory scheme out of whole cloth in order for plaintiff to receive a refund.

2. The terms "spent mash" and "slop" are undefined and not even mentioned in the General Statutes.

3. There is no "spent mash" exception or exemption from tax such as plaintiff's lawsuit contemplates.

4. There is no statute or case which supports the relief plaintiff seeks, or even differentiates "spent mash" or "slop" from "mash." N.C.G.S. §§ 105-113.106. 105-113.107.

5. In order for plaintiff to prevail, or even get to trial, the court must violate separation of powers and create statutes that do not exist.

6. Further, there is no factual basis for plaintiffs assertion that the substance that was seized did not contain alcohol. The alleged "spent mash" was in actuality "mash," therefore properly taxed.

7. Plaintiffs argument further relies upon constitutional claims regarding what he alleges was an illegal search.

8. The exclusionary rule does not apply to civil tax matters.

9. Furthermore, as a result of plaintiff's pleas of guilty to criminal charges arising from the same facts as in the case at bar, plaintiffs' action is barred under the doctrines of collateral estoppel and resjudicata.

10. Plaintiffs lawsuit is barred by the Declaratory Judgment Act.

11. This matter must be dismissed for failure to state a claim upon which relief may be granted pursuant to N.C. Rules of Civil Procedure 12(b)(6).

WHEREFORE, having fully answered the complaint filled herein, for his relief defendant prays the Court that:

1. It dismiss plaintiffs complaint and order that the plaintiff recover nothing from the defendant;

2. it assess no costs to defendant; and

3. it award defendant such other relief as may appear reasonable and proper in the premises.

Respectfully submitted this 17th dav of July, 2002.

ROY COOPER
Attorney General

/s/

David J. Adinolfi II
Assistant Attorney General
Suite 606, Revenue Building
Post Office Box 629

Raleigh, North Carolina 27602-0629
Telephone (919) 716-6550
Fax (919) 715-3550
dadinolfi@mail.jus.state.nc.us

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has this day served a copy of the foregoing Verified Answer upon the person indicated below by depositing said copy in the United States mail, postage prepaid, addressed as follows:

Thomas Edward Hodges
Post Office Box 697
Benson. North Carolina 27504
This 17th day of July, 2002.

ROY COOPER
ATTORNEY GENERAL

/s/
David J. Adinolfi II
Assistant Attorney General

STATE OF NORTH CAROLINA
COUNTY OF HARNETT

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
02-CVS-975

DELMON LEE, JR.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	**VERIFICATION**
E. NORRIS TOLSON,	)	
SECRETARY OF	)	
REVENUE	)	
	)	
Defendant.	)	

Ronald G. Starling, being first duly sworn, deposes and says that he has read the Verified Answer to Plaintiffs Complaint and knows the contents thereof and that the same is true of his own knowledge, except as to those matters and things therein alleged upon information and belief and as to those matters and things, he believes them to be true.

/s/
Ronald G. Starling, Director
Unauthorized Substances Tax Division
SWORN AND SUBSCRIBED before me this 17th day of July 2002

/s/
Notary Public

My Commission expires: 9-24-06

NORTH CAROLINA

HARNETT COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 02 CVS 00975

DELMON LEE JR.,	)	
	)	
Plaintiff,	)	
	)	COMPLAINT
vs.	)	
	)	
E. NORRIS TOLSON,	)	
Secretary of Revenue,	)	
	)	
Defendant.	)	

Now come Plaintiff, Delmon Lee Jr., and alleges and says:

PRELIMINARY STATEMENT

1. This suit is brought by Plaintiff Delmon Lee Jr. for a refund of that portion of his over payment to Defendant of unauthorized substances taxes levied on "slop" or "spent mash" that was seized during a January 15, 1999 raid and search of a building owned by Larry Fitch Clark, Sr. and improperly included in the reported inventory of calculated gallons of mash as defined in N.C.G.S. 105-113.106(6a) and assessed against Plaintiff in accordance with the provisions of

Section 105-113.107(c) *et seq.* of Article 2D of Chapter 105 of the General Statutes of North Carolina.

2. The Second Cause of Action is brought by Plaintiff Delmon Lee Jr., pursuant to the Fourth and Fourteenth Amendments of the United States Constitution and Article I, Sections 19 and 20 of the North Carolina Constitution for a violation of his civil rights and a refund of a sum of money that was seized during an unlawful raid and search of his personal residence on January 15, 1999.

PARTIES

3. Plaintiff is a citizen and resident of Harnett County, North Carolina.

4. Defendant is the Secretary of Revenue of the State of North Carolina and is being sued only in his official capacity.

JURISDICTION

5. This suit is instituted pursuant to the provisions of Section 105-267 of Article 9 of Chapter 105 of the General Statutes of North Carolina.

FIRST CLAIM FOR RELIEF

(Refund of overpayment of taxes levied on "slop" or "spent mash")

6. Arrest records reveal that in December 1998, North Carolina Alcohol Law Enforcement

(hereinafter referred to as "ALE") received a complaint that a distillery was located behind a large white house near Bethel Baptist Road in Harnett County, North Carolina.

7. In response to the complaint, arrest records reveal that ALE agents began an investigation of the premises described in the complaint, and from their position in the woodline area bordering the premises, ALE agents on December 28, 1998, January 6, 1999 and January 8, 1999 detected the odor of fermenting mash emanating from the area of a building located on lands determined to be owned by Larry Fitch Clark, Sr.

8. Arrest records reveal that on January 13, 1999 from their woodline position. ALE agents observed radiant heat coming from the tin roof of the wooden building subject to investigation and detected an odor of mash.

9. Arrest records reveal that on January 13, 1999, ALE agents began a round the clock surveillance of the Clark property, and on January 15, 1999, ALE agents obtained a search warrant to search the building located on the lands determined to be owned by Larry Fitch Clark, Sr.

10. Arrest records reveal that on January 15, 1999, ALE agents and the Harnett County Sheriff's Department executed the search warrant and searched the building located on the lands owned by Larry Fitch Clark, Sr. and seized a distillery, 1,552 gallons of nontaxpaid liquor and 9,485 gallons of mash.

11. Arrest records reveal that on January 19, 1999, J. S. Powell, Enforcement Officer of the Unauthorized Substance Division of the North Carolina Department of Revenue, issued a Notice of Unauthorized Tax Assessment to Plaintiff assessing him with $32,006.40 tax, $3,200.64 penalty and $213.38 interest for a total assessment of $35,4 42 based upon his possession of 1,552 gallons of no axpaid liquor and 9,485 gallons of mash.

12. The assessment of unauthorized substances taxes was paid within forty-eight (48) hours of possession thereby eliminating the assessment of penalty and interest.

13. N.C.G.S. 105-113.106(6a) defines mash as the fermentable starchy mixture from which spirituous liquor can be distilled and N.C.G.S. 105-113.107(c) levies an excise tax on mash at the rate of $1.28 per gallon or fraction thereof.

14. "Slop" or "spent mash", as defined by custom and course of dealing and usage of trade in the moonshine or whiskey making business, is considered to be the by-product resulting from the distilling of alcohol out of mash and is not subject to a levy of excise tax.

15. Chapter 105 of the North Carolina General Statutes neither defines "slop" or "spent mash" nor levies an excise tax on "slop" or "spent mash".

16. On form AL-50 Property Report, ALE agent John M. Adorjan inaccurately reported on the quantity of mash seized during the search of the Clark property on January 15, 1999 by improperly including in his calculations of 9,485 gallons of mash several thousand gallons of "slop" or "spent mash" that does not qualify or meet the definition of mash as defined in N.C.G.S. 105-113.106(6a) and is thereby not subject to taxation within the provisions of Section 105-113.107(c) *et seq.* of Article 2D of Chapter 105 of the General Statutes of North Carolina.

17. On February 18, 1999, Plaintiff issued a timely letter of protest to the Secretary of Revenue objecting to the accuracy of the reported quantity of mash subject to levy and the assessment of unauthorized substances taxes issued to him on January 19, 1999 and requesting a hearing.

18. The Secretary of Revenue did not refund the taxes within ninety (90) days from and after the date of Plaintiff's letter of protest.

19. On July 23, 1999, a hearing was held before the Assistant Secretary of Revenue, Michael A. Hannah, and by his final decision dated April 10, 2000, the Assistant Secretary of Revenue sustained the assessment and denied Plaintiff's request for a refund of the previously paid unauthorized substances taxes.

20. On May 9, 2000, Plaintiff provided written notice to the Tax Review Board of his intent to petition for an administrative review of the final

decision rendered on April 10, 2000 by the Assistant Secretary of Revenue.

21. On July 10, 2000, Plaintiff filed his Petition for Review with the Tax Review Board.

22. On August 15, 2001, a hearing was held before the Tax Review Board, and by decision entered on November 9, 2001, the Tax Review Board confirmed the final decision of the Assistant Secretary of Revenue.

23. This action is brought within three (3) years after the expiration of the 90-day period for making a refund by the Secretary of Revenue as allowed by N.C.G.S. Section 105-267.

SECOND CLAIM FOR RELIEF

(Unlawful search and seizure of money from residence of Plaintiff Delmon Lee Jr. in violation of the Fourth and Fourteenth Amendments of the United States Constitution and Article 1, Sections 19 and 20 of the North Carolina Constitution)

24. All of the allegations of all of the preceding paragraphs are incorporated herein by reference.

25. Arrest records reveal that in addition to the search of the Clark property on January 15, 1999, Eddie Jaggers, an agent assigned to the narcotics division of the Harnett County Sheriff's Department, on that same date at 10:35 a.m. obtained a search warrant (a copy marked as "Exhibit A" attached hereto

and incorporated herein by reference) to search a residence described on Attachment #2 as a brick house located on Bethel Baptist Church Road.

26. Attachment #1 to the search warrant describes the items to be seized as follows:

"Alcoholic beverages specifically non-tax paid alcohol. Items used to package alcoholic beverages as well as items used to introduce into the body alcoholic beverages. Documents, writings, indicative of the sale, purchase, delivery or receipt of alcoholic beverages. Photographs, letters, documents of persons or associates which may assist in the identification of persons in control of the currency which *apparently* has been received or derived from the sale or delivery of alcoholic beverages or other illegal activities. Documents, writings which are intricative [sic] of or which identify assets which may have been acquired through the proceeds of illegal activities. Documents, writings which instruct, direct or advise persons how to manufacture or distribute alcoholic beverages."

27. To establish probable cause for the issuance of the search warrant, agent Jaggers submitted Attachment #3 with the second paragraph thereof stating:

"Within the past 72 hours of the date and time on this warrant affiant Jaggers was contacted by a confidential source of information (CSI) and this source stated to affiant Jaggers that they had been to the residence described in attachment number 2 in the past 72 hours of the date and time listed on this warrant and

they observed a quantity of non-tax paid alcohol in the residence. This CSI stated that they knew the substance to be non-tax paid alcohol because they have used non-tax paid alcohol in the past. This CSI is reliable to the affiant Jaggers because they have led the affiant Jaggers to at least five arrests for controlled substance violations in the past 12 months."

28. The confidential informant did not identify or describe the owner of the residence; how the confidential informant came to be in the residence; the person(s) persent, if any, while he was in the residence; the quantity of non-tax paid alcohol observed (i.e., just a small amount, such as a drink, or a greater quantity, such as a case or more); how the non-tax paid liquor was packaged; the location or particular area in the residence where the confidential informant actually saw the non-tax paid liquor; any trafficking of people in and out of the residence buying and selling non-tax paid liquor; or any other basis for establishing the confidential informant's expertise or ability to distinguish between alcohol that bears a tax stamp and alcohol that does not bear a tax stamp.

29. Neither the face of the search warrant nor any of the supporting attachments thereto identified the identity of the person or persons to be arrested in connection with the search.

30. The search warrant and supporting attachments is void of any information indicating that agent Jaggers attempted to corroborate or verify the informant's story prior to obtaining the search warrant.

31. The described residence to be searched is located just a short distance from the distillery in the building on the Clark property where officers conducted a round the clock surveillance from January 13, 1999 through January 15, 1999.

32. On January 15, 1999, simultaneously with the search of the building on the Clark property, agent Jaggers and other law enforcement officers executed the search warrant for the search of the residence described on Bethel Baptist Church Road.

33. Agent Jaggers and the other law enforcement officers conducted a complete exploratory search of the residence, including all personal and intimate areas of the residence, and seized the sum of $37,200.00 from a small, locked box located in a closet of the personal bedroom belonging to Plaintiff Delmon Lee Jr.

34. The "Inventory of Seized Property" (a copy marked as "Exhibit B" attached hereto and incorporated herein by reference) shows that the currency identified as Item Nos. 1, 2, 3 and 4 was contained in a brown BB & T bag, the currency identified as Item No. 5 was in a blue Southern National bag and it was marked or labeled "*mother-in-law*", and the currency identified as Item No. 6 was in another blue Southern National bag.

35. The seized cash was not "currency which *apparently* has been received or derived from the sale or delivery of alcoholic beverages or other illegal activities."

36. On January 15, 1999, Enforcement Officer Julye Powell of the North Carolina Department of Revenue made levy upon and collected $32,006.00 of the cash seized from the residence of Plaintiff Delmon Lee Jr. and applied the cash as payment in full of the unauthorized substances taxes assessed against Plaintiff Delmon Lee Jr. as heretofore set out in paragraph no. 11 herein.

37. On January 25, 1999, with the approval of agent Jaggers, Marie Hairr of the Harnett County Sheriff's Department returned the sum of $5,194.00 cash to Plaintiff Delmon Lee Jr.

38. The "Inventory of Seized Property" does not show that any non-tax paid liquor was seized from the residence of Plaintiff Delmon Lee Jr.

39. The information from the confidential informant as set out in the second paragraph of Attachment #3 is not true, and only by calling the confidential informant as a witness will Plaintiff Delmon Lee Jr. be able to question the veracity of the confidential informant's story and prove that there was no non-tax paid liquor in his residence within 72 hours of January 15, 1999.

40. The attachments to the search warrant did not contain or furnish sufficient information for a finding of probable cause for issuance of the search warrant for the search of the residence of Plaintiff Delmon Lee Jr., and consequently, both the search and seizure of money from Plaintiff Delmon Lee Jr.'s residence was in violation of the Fourth and Fourteenth

Amendments of the United States Constitution and Article 1, Sections 19 and 20 of the North Carolina Constitution.

41. The aforementioned actions of Defendant have caused Plaintiff to be subjected to a deprivation of his rights secured by the Fourth and Fourteenth Amendments of the United States Constitution, in violation of 42 U.S.C. Section 1983, and Article I, Sections 19 and 20 of the Constitution of North Carolina.

42. Pursuant to 42 U.S.C. Section 1988 and N.C.G.S. Section 6-19, Plaintiff is entitled to reasonable attorney's fees, to be determined following the conclusion of this action upon the submission of Plaintiff's attorney's affidavit for time, expenses and costs.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays unto the Court as follows

1. That Plaintiff Delmon Lee Jr. have and recover of Defendant a refund of an amount to be proven at trial in excess of $10,000.00 in actual damages for his over payment to Defendant of unauthorized substances taxes that was improperly levied on "slop" or "spent mash" plus interest, costs and expenses, and attorney fees as allowed by law;

2. That Plaintiff Delmon Lee Jr. have and recover of Defendant a refund of an amount to be

proven at trial in excess of $10,000.00 in actual damages for the illegal search and seizure of money from his residence plus interest, costs and expenses, and attorney fees as allowed by law;

3. For a trial by jury on all issues so triable; and

4. For such other and further relief as to the Court may seem just and proper.

Respectfully submitted this 5th day of June, 2002.

/s/

Thomas Edward Hodges
Attorney for Plaintiff
P. O. Box 697
Benson, NC 27504
(919) 894-2603

File No.	▶File No.	STATE OF NORTH CAROLINA In the General Court District Court Division Harnett County
SEARCH WARRANT		
In the Matter of		To any officer with authority and jurisdiction to conduct the search authorized by this Search Warrant: I, the undersigned, find that there is probable cause to believe that the property and person described in the application on the reverse side and related to the commission of a crime is located as described in the application. You are commanded to search the premises, vehicle, person, and other place or item described in the application for the property and person in question. If the property and/or person are found,
THE RESIDENCE AS DESCRIBED IN ATTACHMENT #2		
Date Issued 1-15-99	Time Issued 10:35 ☒AM ☐PM	
Name of Applicant AGENT D.E. JAGGERS		
Name of Additional Affiant		
Name of Additional Affiant		
RETURN OF SERVICE I certify that this Search Warrant was received and executed as follows:		
Date Received	Time Received ☐AM ☐PM	
Date Executed	Date and Time of Return	

<table>
<tr><td>☐ I made a search of
_____
_____
_____
_____

as commanded

☐ I seized the items listed on the attached inventory
☐ I did not seize any items
☐This warrant was not executed within 48 hours of the date of issuance and I hereby return it not executed</td><td colspan="2">make the seizure and keep the property subject to Court Order and process the person according to law.

You are directed to execute this Search Warrant within forty-eight (48) hours from the time indicated on this Warrant and make due return to the Clerk of the Issuing Court.

This Search Warrant is issued upon information furnished under oath by the person or persons shown.</td></tr>
<tr><td>Signature of Officer Making Return</td><td>This Search Warrant was returned to me on the date and time shown below</td><td>Date
1-15-99</td></tr>
<tr><td>Department or Agency of Officer</td><td>Date</td><td>Signature</td></tr>
</table>

	☐ Deputy CSC ☐ Asst. CSC ☐ Clerk of Superior Court ☑ Magistrate ☐ District Ct. Judge ☐ Superior Ct. Judge
Signature	
☐ Deputy CSC ☐ Asst. CSC ☐ Clerk of Superior Court	

APPLICATION FOR SEARCH WARRANT

I, D.E. JAGGERS, AGENT, HARNETT COUNTY SHERIFF'S OFFICE
(*Insert name and address: or if law enforcement officer, name, rank and agency*)

being duly sworn, request that the court issue a warrant to search the person, place, vehicle, and other items described in this application and to find and seize the property and person described in this application. There is probable cause to believe that

SEE ATTACHMENT #1
(*Describe property to be seized: or if search warrant is to be used for searching a place*)

(*to serve an arrest warrant or other process, name person to be arrested*)

constitutes evidence of a crime and the identity of a person participating in a crime,

VIOLATIONS OF THE NORTH CAROLINA CONTROLLED SUBSTANCES ACT and is located
(*Name Crime*)

(*check appropriate box(es) and fill-in specified information*)

☒ in the following premises SEE ATTACHMENT #2
(Give address, and if useful, describe premises)

(*and*)

☐ on the following person(s) _____
(Give name(s) and, if useful, describe person(s))

_____

(*and*)

☒ in the following vehicle(s) ANY VEHICLES UNDER CONTROL OF OCCUPANTS
(Describe vehicle(s))

_____

(*and*)

☒ ANY OUTBUILDINGS OR STORAGE SHEDS
(*Name and/or describe other places or items to be searched, if applicable)*

The applicant swears to the following facts to establish probable cause for the issuance of a search warrant:
SEE ATTACHMENT #3

SWORN AND SUBSCRIBED TO BEFORE ME
Date 1-15-99
Signature /s/
☐ Deputy CSC ☐ Asst. CSC ☐ Clerk of Superior Court
☒ Mag. ☐ Judge

Signature of Applicant
/s/

☒ In addition to the affidavit above, this application is supported by additional affidavit(s) attached, made by AGENT D.E. JAGGERS

☐ In addition to the affidavit above, this application is supported by additional affidavit(s) attached, made by

This testimony has been (check appropriate box) ☐ reduced to writing ☐ tape recorded and I have filed each with the Clerk.

* If a continuation is necessary, continue the statement on an attached sheet of paper with a notation saying "see attachment." Date the continuation and include it on the signatures of applicant and issuing official.

STATE OF NORTH CAROLINA
HARNETT COUNTY PAGE ONE OF FOUR

CONTINUATION OF ITEMS TO BE SEIZED

ATTACHMENT #1

ALCOHOLIC BEVERAGES SPECIFICALLY NON-TAX PAID ALCOHOL. ITEMS USED TO PACKAGE ALCOHOLIC BEVERAGES AS WELL AS ITEMS USED TO INTRODUCE INTO THE BODY ALCOHOLIC BEVERAGES. DOCUMENTS, WRITINGS, INDICATIVE OF THE SALE, PURCHASE, DELIVERY OR RECEIPT OF ALCOHOLIC BEVERAGES. PHOTOGRAPHS, LETTERS, DOCUMENTS OF PERSONS OR ASSOCIATES WHICH MAY ASSIST IN THE IDENTIFICATION OF PERSONS IN CONTROL OF THE CURRENCY WHICH *APPARENTLY* HAS BEEN RECEIVED OR DERIVED FROM THE SALE OR DELIVERY OF ALCOHOLIC BEVERAGES OR OTHER ILLEGAL ACTIVITIES. DOCUMENTS, WRITINGS WHICH ARE INTRICATIVE OF OR WHICH IDENTIFY ASSETS WHICH MAY HAVE BEEN ACQUIRED THROUGH THE PROCEEDS OF ILLEGAL ACTIVITIES. DOCUMENTS, WRITINGS WHICH INSTRUCT, DIRECT OR ADVISE PERSONS HOW TO MANUFACTURE OR DISTRIBUTE ALCOHOLIC BEVERAGES.

SWORN TO AND SUBSCRIBED BEFORE ME:

/s/
MAGISTRATE

1-15-99 10:35 a.m.
DATE TIME

/s/
AFFIANT

STATE OF NORTH CAROLINA
HARNETT COUNTY

ATTACHMENT #2

IN HARNETT COUNTY AT THE INTERSECTION OF BETHEL BAPTIST CHURCH ROAD RPR 2048 AND N.C. 210 TURN ONTO BETHEL BAPTIST CHURCH ROAD AND TRAVEL 2.3 MILES TO A BRICK HOUSE ON THE LEFT WHICH WILL BE THE RESIDENCE TO BE SEARCHED. THE RESIDENCE WILL BE A SINGLE STORY BRICK HOUSE WITH WHITE DOORS. FACING THE HOUSE FROM THE HIGHWAY IMMEDIATELY TO THE RIGHT WILL BE A SMALL MOBILE HOME PARK WITH FIVE MOBILE HOMES IN SAME AND IMMEDIATELY TO THE LEFT WILL BE A SMALL WHITE OUT BUILDING.

SWORN TO AND SUBSCRIBED BEFORE ME,

/s/
MAGISTRATE

1-15-99 10:35 a.m.
DATE TIME

/s/
AFFIANT

STATE OF NORTH CAROLINA
HARNETT COUNTY

ATTACHMENT #3

PROBABLE CAUSE:

FIRST PARAGRAPH

I, THE UNDERSIGNED, EDDIE JAGGERS, HAVE BEEN A SWORN LAW ENFORCEMENT OFFICER FOR OVER EIGHT YEARS WITH THE HARNETT COUNTY SHERIFF'S DEPARTMENT AND HAVE BEEN ASSIGNED TO THE NARCOTICS DIVISION ON THE HARNETT COUNTY SHERIFF'S DEPARTMENT FOR OVER 4 YEARS. I HAVE RECEIVED THE BASIC LAW ENFORCEMENT CERTIFICATE FROM FAYETTEVILLE TECHNICAL COLLEGE, BASIC CRIMINAL INVESTIGATIONS FROM NORTH CAROLINA JUSTICE ACADEMY, DRUG ENFORCEMENT FOR PATRO OFFICERS FROM THE N.C. JUSTICE ACADEMY, PLI-MODULE 1 SEARCH WARRANTS FROM THE N.C. JUSTICE ACADEMY. I GRADUATED FROM MOUNT OLIVE COLLEGE AND RECEIVED A BACHELOR'S OF SCIENCE DEGREE IN CRIMINAL JUSTICE. I HAVE ATTENDED AND RECEIVED THE CERTIFICATE FOR TECHNIQUES OF DRUG LAW ENFORCEMENT FROM THE N.C. JUSTICE ACADEMY I HAVE PARTICIPATED IN THE EXECUTION OF SEVERAL SEARCH WARRANTS AND THE GATHERING OF INFORMATION TO OBTAIN SEARCH WARRANTS. WHILE I HAVE BEEN EMPLOYED AS A LAW ENFORCEMENT OFFICER I HAVE MADE OVER 400

ARRESTS FOR VIOLATION OF THE NORTH CAROLINA CONTROL SUBSTANCE ACT. I HAVE ALSO MADE NUMEROUS ARRESTS FOR OTHER CRIMES INCLUDING BREAKING AND ENTERING, LARCENY, RAPE, PROSTITUTION, AND SEXUAL OFFENSES.

SECOND PARAGRAPH

WITHIN THE PAST 72 HOURS OF THE DATE AND TIME ON THIS WARRANT AFFIANT JAGGERS WAS CONTACTED BY A CONFIDENTIAL SOURCE OF INFORMATION (CSI) AND THIS SOURCE STATED TO AFFIANT JAGGERS THAT THEY HAD BEEN TO THE RESIDENCE LISTED ON THIS WARRANT AND THEY OBSERVED A QUANTITY OF NON-TAX PAID ALSOHOL IN THE RESIDENCE. THIS CSI STATED THAT THEY KNEW THE SUBSTANCE TO BE NON-TAX PAID ALCOHOL BECAUSE THEY HAVE USED NON-TAX PAID ALCOHOL IN THE PAST. THIS CIS IS RELIABLE TO THE AFFIANT JAGGERS BECAUSE THEY HAVE LED THE AFFIANT JAGGERS TO AT LEAST FIVE ARRESTS FOR CONTROLLED SUBSTANCE VIOLATIONS IN THE PAST 12 MONTHS.

BASED UPON THE FOREGOING FACTS THE AFFIANT PRAYS A SEARCH WARRANT BE THE ISSUED AND ALL EVIDENCE HELD UNTIL DISPOSITION OF COURT ORDER.

SWORN TO AND SUBSCRIBED BEFORE ME,

/s/

MAGISTRATE

1-15-99 10:35 a.m.
DATE TIME

/s/
AFFIANT, EDDIE JAGGERS
H.C.S.D.

STATE OF NORTH CAROLINA In the General Court of Justice ☐ District ☐ Superior Court Division Harnett County	▶ File No. Film No.
In the Matter of Name Delmon Lee Jr. 2285 Bethel Baptist Road Date of Search 1-15-99	INVENTORY OF SEIZED PROPERTY
I, the undersigned officer, executed a search of:	
Person, place or vehicle searched 2285 BETHEL BAPTIST ROAD SPRING LAKE NC	
This search was made pursuant to ☒ a search warrant issued by: Cheryl B. Fahling ☐ a consent to search given by: ☐ other legal justification for the search:	
The following items were seized	
Item #1 - 9000 in US currency (Brown BB&T Bag)	
#2 - 9000 in US currency (Brown BB&T Bag)	
#3 - 6500 in US currency (Brown BB&T Bag)	
#4 - 10,000 in US currency (Brown BB&T Bag)	
#5 - 2380 in US currency (Blue southern national #1) (mother-in-law)	
#6 - 120 in US currency (Blue southern national #2)	
#7 - Plastic Jug	
#8 - Plastic Jug	
#9 - 5 Pictures	
☐ *Check here if separate sheet attached*	

-OVER-

I am leaving a copy of this inventory ☐ with the person who consented to the search, named on the reverse ☒ with the owner of the place searched, named below. ☐ with the person from whom the items were seized, named below ☐ with the person in apparent control of the placed searched, named below ☐ in the place searched, identified on the reverse	
Name of owner of the place searched, from whom the items were seized or in apparent control DELMON LEE JR 2285 BETHEL BAPTIST ROAD SPRING LAKE NC	
The law enforcement agency identified below will hold the seized property subject to Court Order.	
SWORN AND SUBSCRIBED TO BEFORE ME	Signature of Law Enforcement Officer /s/
Date	Title AGENT
Signature	Agency HCSD
☐ Deputy CSC ☐ Assistant CSC ☐ Clerk of Superior Court ☐ Magistrate	Address PO Box 399 Lillington NC 27546
Acknowledgment of Receipt I, the undersigned, received a copy of this inventory Date 1-15-99 Signature of Recipient /s/	

STATE OF NORTH CAROLINA

FILE NO.
2CV500975

Harnett County

In the General District Court of Justice
☐ District ☒ Superior Court Division

Plaintiff Delmon Lee Jr.	APPLICATION AND ORDER EXTENDING TIME TO FILE COMPLAINT G.S. 1A-1, Rule 3
VERSUS	
Defendant E. Norris Tolson, in his official capacity as the Secretary of the N. C. Department of Revenue	
APPLICATION	
The undersigned requests permission to file a complaint in this action within twenty days of any order granting this Application, as provided in Rule 3 of the Rules of Civil Procedure. The nature and purpose of the action are:	

Nature and Purpose Of The Action Two causes of action: (1) Plaintiff seeks a refund of that portion of his over payment to Defendant of unauthorized substances taxes improperly levied on "slop" or "spent mash" seized during a Jan. 15, 1999 raid and search of a building owned by Larry Fitch Clark, Sr. & improperly included in the reported inventory of calculated gallons of mash as defined in Sec. 105-113.106(6a) & assessed against Plaintiff in accordance with Sec. 105-113.107(b)(2) et seq. of Art. 2D of Chp. 105 of Gen. Stat. of N.C. (2) Second action brought pursuant to the Fourth & Fourteenth Amds. of U.S. Const. & Art I Sec. 20 of N.C. Const. for refund of money seized during an unlawful raid & search of his personal residence on Jan. 15, 1999.

Date May 17, 2002	/s/
☐ *Applicant* ☒ *Attorney for Applicant*	

ORDER

The Court states that the nature and purpose of this action are set forth above.

Therefore, it is ORDERED that permission is granted to the applicant to file a complaint in this action up to and including the date shown below.

File Complaint On Or Before: 6/5/02	*Date Of Order* 5/17/02
(Date must be within 20 days of date of Order)	*Signature* /s/
☒ *Assistant CSC* ☐ *Clerk of Superior Court*	

NOTE: *Under Rule 3 of the Rules of Civil Procedure, upon entry of this Order, a summons shall be issued and the summons and a copy of this Order must be served in*

accordance with the provisions of Rule 4 or by registered mail if the plaintiff so elects. If a complaint is not filed within the above period, the action shall abate.

AOC-CV-101
Rev. 5/88

North Carolina Department of Revenue

James B. Hunt, Jr.
Governor

Muriel K. Offerman
Secretary

November 30, 1999

Mr. Thomas E. Hodges
Attorney at Law
P.O. Box 697
Benson, North Carolina 27504

Re: Administrative Tax Hearing - Larry Clark & Delmon Lee

Dear Mr. Hodges:

On November 18 the enclosed additional information was submitted by the Unauthorized Substance Tax Division for the record of the administrative tax hearing for your above named clients.

It is my policy to always give the taxpayer the last opportunity to be heard in these matters. You shall have until January 14, 2000, to submit a written response or any other additional evidence that you wish to have placed into the record. In the event I do not receive any additional information from you by then, I will assume that you have decided not to submit anything else and my final decision regarding the assessment will be based upon the record appearing on that date.

I will also consider the hearing as having concluded on January 14, 2000, for purposes of G.S. 105-241.1. In the meantime, if you have any questions regarding the matter, please feel free to contact me at (919) 733-7211.

Very truly yours,

/s/ Michael A. Hannah
Michael A. Hannah
Assistant Secretary of Revenue

cc: Tim Humphrey

P.O. Box 25000, Raleigh, North Carolina 27640
State Courier 51-71-00
An Equal Opportunity Employer

EXHIBIT 1

North Carolina
STATE BUREAU OF INVESTIGATION

Department of Justice
RALEIGH

LABORATORY REPORT

<table>
<tr><td rowspan="3">TO:
Agent John M. Adjorjan
N.C. Alcohol Law Enforcment
313 Union Street
Suite 110
Fayetteville,
N.C. 28301</td><td>SBI FILE NO:</td><td>SBI LAB NO:
R990016310</td></tr>
<tr><td>AGENCY FILE NO:
98-156-113</td><td>EXAMINED BY:
A.M. Jensich</td></tr>
<tr><td>LOCATION:
Harnett County</td><td>DATE OF OFFENSE:
January 13, 1999</td></tr>
<tr><td>SUBJECT(S):
LARRY F. CLARK
DELMON LEE</td><td>TYPE OF CASE:
VPL</td><td>DATE SUBMITTED:
August 24, 1999</td></tr>
<tr><td rowspan="2"></td><td rowspan="2">MATERIAL SUBMITTED BY:
Addressee</td><td>DATE COMPLETED:
October 1, 1999</td></tr>
<tr><td>DATE TRANSCRIBED:
October 12, 1999</td></tr>
</table>

ITEMS SUBMITTED:

Item 2: A plastic bottle containing clear liquid.
Item 16: A plastic bottle containing clear liquid.
Item 17: A plastic bottle containing a light brown liquid.

TYPE ANALYSIS REQUESTED:

Analyze for the concentration of ethyl alcohol and lead.

RESULTS OF ANAYLSIS:

Item 2:	44 percent alcohol by volume.
	Lead - less than one part per million.
	Volume of liquid - 99 milliliters.
Item 16:	44 percent alcohol by volume.
	Lead - less than one part per million.
	Volume of liquid - 124 milliliters.
Item 17:	10 percent alcohol by volume.
	Lead - less than one part per million.
	Volume of liquid - 102 milliliters.

DISPOSITION OF EVIDENCE:

The unconsumed portion of the evidence is being returned via first-class mail.

AMJ:jd
Attachment

I, Michael F. Easley, Attorney General of the State of North Carolina, hereby certify that the form identified as: North Carolina State Bureau of Investigation, Department of Justice, Laboratory Report is a from approved by me for the purpose stated in G.S. 90-95(g) and approved by me in compliance with the said statute.

COPIES TO:
Mr. Thomas H. Lock, D.A.

THIS REPORT IS TO BE USED ONLY IN CONNECTION WITH AN OFFICIAL CRIMINAL INVESTIGATION.

/s/ Jamas J. Coman
Jamas J. Coman, Director

This report represents a true and accurate result of my analysis on the item(s) described.

/s/ A.M. Joncich
A.M. Joncich

CONFIDENTIAL. This is an official file of the North Carolina State Bureau of Investigation. To make public or reveal the contents thereof to any unauthorized person is a violation of the General Statutes of North Carolina.

NORTH CAROLINA)
) AFFIDAVIT
JOHNSTON COUNTY)

JUNIUS P. BYRD, being first duly sworn, deposes and says:

My name is Junius P. Byrd, sometimes referred to as Junior Byrd. and I reside in Johnston County at 315 Oliver Grove Road, Four Oaks, North Carolina 27524.

I was born on August 10, 1929, and I am 70 years of age. For more than fifty years of my life, I have made liquor. During my lifetime, I have been caught about 10 times for making liquor, and on one occasion, I served a year and one day in federal prison in Montgomery, Alabama for making liquor. And, not so long ago, I publicly displayed my liquor making skills in the form of a documentary for David Crabtree of Channel 5 News. Like any profession, the more you do it, the better you become. And, by having at least 50 years of experience making liquor, I feel like I am very knowledgeable in the fine art of making liquor. The product that I have always produced is usually referred to by most folks as "moonshine." But, to the state and government officers and agents who are constantly in search of home brew, my product is typically classified as "nontaxpaid alcohol." Other than having a properly constructed distillery, which I generally refer to as a "still", it is necessary to have certain

other ingredients in order to produce liquor. These other ingredients, which usually consist of sugar, ship material (wheat by-products, corn, barley, etc.) and water, comprise or make up what moonshiners usually refer to as "mash." An essential ingredient of mash is sugar. Without sugar, the mixture will never ferment or work off, and it can not be cooked to make liquor. After a mixture of properly prepared mash has fermented or worked off, it is then ready to be put in the kettle or cooker. While in the cooker, the mash is boiled with the steam passing through the doubler and then into the shotgun condenser where the steam is cooled and turned into a liquid. This liquid product is liquor or moonshine, and the first running of this liquid is usually referred to as the "high wines" because of its high proof content. After running a charge, that is to say, after the mash has been completely cooked and will not produce any more liquor, the distillery process is stopped and the entire cycle must be repeated in order to produce anymore liquor. The mixture remaining in the cooker after the running of a charge (after the mash is cooked) is usually referred to as "slop." Some people may refer to it as "spent mash", but most of the old timer moonshiners generally refer to the mixture as "slop." This is not to be confused with the slop or food mixture that farmers or other swine producers used to feed to hogs. It is simply a by-product of making liquor. After running of a charge, the slop may either be pumped out onto the ground or some of it may be pumped into a barrel or other container where

it is saved for later use as a bedding for a fresh batch of mash. This by–product, however, can not be used solely by itself to make liquor. It is obvious that traces of alcohol will remain in the slop, but it simply can not be recooked by itself to make liquor. Slop looks just like regular mash, and it may even smell, bubble or appear to ferment just like regular mash, but it simply can not be recooked to produce liquor. And, because of the obvious similarities, the novice observer or even a veteran ALE agent will look at a container of slop and will immediately conclude that it is regular, fermentable mash. This is to be expected, because only the actual producer, or someone with years of liquor making experience - like myself - will be able to look at a container of spent mash and know that it is nothing more than slop. Knowing the difference between regular mash and slop is like knowing the difference between a high grade and a low grade diamond. Both may look alike in appearance, but only an expert with many years of hands on experience will be able to note the sutle difference with a naked eye inspection.

This the 18th day of August, 1999.

/s/
JUNIUS P. BYRD

NORTH CAROLINA
HARNETT COUNTY

I, Doris Lee Hodges, a Notary Public in and for said County and State, do hereby certify that JUNIUS P. BYRD personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

WITNESS my hand and notarial seal this the 18th day of August, 1999.

/s/
NOTARY PUBLIC

My commission expires: 3-28-2000

PROCEEDINGS

MR. HANNAH: This is July the 23rd, 1999. It's 2:00 p.m. We are in Room 605 of the North Carolina Department of Revenue Building. This is the appointed time and place for administrative -- for two administrative tax hearings requested by Larry Clark and Delmon Lee, Jr., both of Spring Lake, North Carolina.

There are two separate assessments. They arise out of the same fact situation, allegedly. And with the permission of the taxpayers and taxpayers' counsel, the two hearings will be combined into one. Both taxpayers are present. They are represented by legal counsel, Mr. Thomas Hodges. And from the Department of Revenue Unauthorized Substance Tax Division, Mr. Ron Starling and Mr. Tim Humphrey are present. And here at the request of the Department from the North Carolina ALE, Mr. Vance Jackson and Mr. John Adorjan; is that correct?

(Inaudible response.)

And also from the Wake County ABC, Mr. Wes Nipper. And at this time I will -- the taxpayers' counsel has been given a copy of both briefs for the tax hearing. And so at this time I will ask Mr. Starling to proceed with the (Inaudible). Mr. Starling?

MR. STARLING: Thank you. The Unauthorized Substance Tax Division has a proposed assessment against both

taxpayers, Mr. Delmon Lee, Jr. and Mr. Larry Fitch Clark, Sr. The assessment -- proposed assessment is dated January 19th of 1999 in the amount of $32,006.40 in tax, a penalty of $3,260 -- $3,200.64, the interest is $213.38, for a total of $35,420.42. I might note that a payment was made within 48 hours after this assessment was made in the amount of $32,006.00, thereby causing the Department to waive the penalty and interest.

The facts in the case for both taxpayers are a little different. And what I will do is first go over the facts for -- relating to Mr. Lee. The assessment against Mr. Lee and, of course, of Mr. Clark, are assessed pursuant to G.S. 105-113.105. For Mr. Lee, in December of 1998, officers with the North Carolina Alcohol Law Enforcement received a complaint that there was an illegal distillery located behind a large white house on Bethel Baptist Road. On December 18th, North Carolina Alcohol Law Enforcement received information from the Harnett County Sheriff's Department that a confidential informant had purchased nontaxpaid alcoholic beverages from Mr. Lee's residence. The confidential informant had also seen several gallons of nontaxpaid alcohol at Mr. Lee's residence, but was told that the distillery was not at Mr. Lee's residence but close by. On January 15th, when officers executed a search warrant to search Mr. Clark's property, the taxpayer and -- the taxpayer being Mr. Lee --

would be the same, with the exception -- and I would note that the --at the bottom of the exhibits, you see here, are marked U.S. 2 -- or U.S. as -- the summary list is U.S. 3 -- I see there's a difference here -- "Report of Arrest and/or Seizure Involving Nontaxpaid, Unstamped Illicit Liquor"; BD-4L, dated January 15th, 1999 in the name of Larry Fitch Clark, Jr. -- Sr., excuse me. And then the other difference from Mr. Lee's case would be Exhibit U.S. 7, an affidavit, which I signed, stated that we could find no record of Mr. Clark having made application for illicit liquor stamps. And I believe, Mr. Hannah, those are the only two differences in the exhibits on the evidence that we would like to have entered.

MR. HANNAH: Mr. Hodges, any objection to any of those exhibits, U.S. 1 through U.S. 7?

MR. HODGES: I'll just renew my same previous objection as to the quantity of mash.

MR. HANNAH: All right. The exhibits will be admitted into record, again noting Mr. Hodges' objection.

Anything else at this time, Mr. Starling?

MR. STARLING: No, sir.

MR. HANNAH: So the tax has been paid?

MR. STARLING: Yes, sir.

MR. HANNAH: And this is, in essence, a request for a refund?

MR. STARLING: Yes, sir.

MR. HANNAH: Mr. Hodges, I'm enthused to hear from you, sir.

MR. HODGES: Okay. First, I just want to ask Mr. Starling one question. Are taxes required on mash?

MR. STARLING: Yes, sir.

MR. HODGES: On mash or just the liquor?

MR. STARLING: I'm sorry?

MR. HODGES: I said, are revenue taxes required, or stamps, on mash, not spirituous liquor, but mash?

MR. STARLING: Can I borrow your logbook?

(Unidentified speaker): Certainly.

(Inaudible response.)

MR. HODGES: I was a little late getting mine updated from the Benson Company, so I wondering about that.

(Unidentified speaker): There's a different tax (inaudible).

MR. STARLING: I want to find it to give you an act answer. "Illicit Spirituous Liquor," and this is

found in 105-113.106(4b), "Spirituous liquor is defined in G.S. 105-113.68, not authorized by North Carolina Alcohol Beverage Control Commission. Some examples of illicit spirituous liquor are the products known as bootleg liquor, moonshine, nontaxpaid liquor, and white liquor." 105-113.106 (6a), mash is here.

MR. ADORJAN: Yes, sir, uh-huh.

MR. HODGES: Is that where the two gallons of nontaxpaid liquor is also?

MR. ADORJAN: That's correct.

MR. HODGES: You keep it in there?

MR. ADORJAN: Yes, sir.

MR. HODGES: And you've had it in there ever since the days of this event?

MR. ADORJAN: Yes, sir.

MR. HODGES: Have you had this sample analyzed?

MR. ADORJAN: Yes, sir.

MR. HODGES: Who analyzed it?

MR. ADORJAN: The State Bureau of Investigation.

MR. HODGES: Have you got the result of that?

MR. ADORJAN: No. We were talking about that earlier. I don't have those –

MR. JACKSON: I take the blame for that, Mr. Hodges. I've been up in Federal Court in Virginia all this week, and I had about 25 case files with me. And I have misplaced the copy that was in this case file. Mr. Adorjan has another copy. But I'm sure I had it somewhere, but we didn't – it was not in the case file.

MR. HODGES: Did you take that actual mash to the state lab?

MR. ADORJAN: Yes, sir. It's a small sample that

MR. ADORJAN: Yes, sir, I did.

MR. HODGES: And how soon after you obtained it did you carry it up there?

MR. ADORJAN: Sometime in that next week.

MR. HODGES: That same week?

MR. ADORJAN: Yes, sir, I believe so. It was either the next week or the following.

MR. HODGES: Do you know who got the results back?

MR. ADORJAN: They usually take three weeks to a month to get things back.

MR. HODGES: So you recently got it back?

MR. ADORJAN: No, I've had it back for quite some time. I'm sure I submitted it in January sometime, but I'm sure I had the results by March, probably.

MR. HODGES: But I believe we can say for sure that it's your testimony that none of the contents in the cookers was actually sampled or analyzed and the other remaining seven vats was not sampled or analyzed?

MR. ADORJAN: That's correct.

MR. HODGES: Is that correct?

MR. ADORJAN: Yes, sir.

MR. HODGES: Have you ever made any liquor, Mr. Adorjan?

MR. ADORJAN: No, sir, I have not.

MR. HODGES: How long did you make it?

MR. JACKSON: For about two months.

MR. HODGES: Was it for sale or for what?

MR. JACKSON: No, it was to catch some folks with. And we caught quite a few folks. I was a still hand.

MR. HODGES: A still hand?

MR. JACKSON: Worked on the (audible), yes, sir.

MR. HODGES: So you actually know what goes into the mash itself?

MR. JACKSON: Yes, sir.

MR. HODGES: You can make it up?

MR. JACKSON: I guess I – I'm no expert, by any means.

MR. HODGES: How much time did you spend making it?

MR. JACKSON: I spent two months up there working at a liquor still.

MR. HODGES: Every day?

MR. JACKSON: Not every day. I hauled it part of the time.

MR. HODGES: Can you construct a still, too?

MR. JACKSON: I probably could come close to it. I probably just - if I see it. I've been in the business 27 years.

MR. HODGES: Twenty-seven years?

Supreme Court case (inaudible).

MR. HODGES: I'm just asking you. Do you have the actual - -

MR. JACKSON: No, sir. I can't see with a blindfold on.

MR. HODGES: Well, can you look at it - -

MR. JACKSON: No, sir.

MR. HODGES: -- and smell of it and distinguish the difference whether it's got a stamp on it or not?

MR. JACKSON: I can be - - I've been an authority on testifying in Criminal Court that it's nontaxpaid liquor.

MR. HODGES: I understand that. But my question is: Can you do that?

MR. JACKSON: Yes, sir, I can testify whether it's nontaxpaid or not. Yes, sir, I've done it many times.

MR. HODGES: No. My question is: Can you put liquor before you, some with a stamp, some without a stamp - -

MR. JACKSON: No, sir.

MR. HODGES: -- and you tell us which is taxpaid and which is nontaxpaid?

MR. JACKSON: No, sir.

MR. HODGES: The same way with this - -

MR. JACKSON: The lab can't either.

MR. HODGES: That's right. It's got to be analyzed. Do you agree with that?

N.C. Alcohol Law Enforcement Division AL-49 CONTINUATION PAGE	Page of Pages 3 6	Case Number 98-156-113

In December 1998 North Carolina Alcohol Law Enforcement (F\JCALE) District V. received a complaint that there was an illegal distillery located behind a large white house on Bethel Baptist Rd. in Harriett County, NC. Pursuant to the complaint Supervisor J.V. Jackson and I drove on Bethel Baptist Rd. and discovered a large white residence on Bethel Baptist Rd. approximately one mile from NC 210.

On the morning of December 18, 1998 I went to the Harriett County Office of land records and pulled the map sheet arid real property maintenance records for the area of land the large white residence was located on. Records indicated the property in question was divided imp two lots, the first, a smaller one acre parcel in which the large white house was located on, was deeded to Michael E. McKoy. The I second, a larger parcel of 9 acres that surrounded the smaller parcel on three sides, was deeded to Larry F. & Joann CLARKE.

On the afternoon of December 18, 1998 Supervisor J.V, Jackson received a call from the Harnett County Sheriff's Office Narcotics Division (HCSO). They stated they had been using a Confidential Source of Information(CSI) to purchase nontaxpaid alcoholic beverages from the home of a Delmon LEE who lived on Bethel Baptist Rd. Supervisor Jackson informed the

Narcotics officers of our illegal distillery complaint. They said their CSI had seen several gallons of nontaxpaid alcohol Bt LEE'S residence but were told the distillery was not at LEE's residence but close by. Agents also said they believed the large white house in question was owned by Larry F, CLARKE'S daughter who was once married to Michael Mckoy.

On December 18, 1998 a check of North Carolina Department of Motor Vehicle (NCDMVJ records and Administrative Office of the Courts records were made on Larry F. CLARKE and Delmon LEE These records indicated CLARKE'S date of birth to be 12-25-1930 and LEE'S as 06-26-1940. They also showed misdemeanor traffic charges that had been disposed. NCDMV records also showed a recent photo of CLARKE which I obtained through DMV records.

On December 28, 1998 I walked in the wooded area surrounding the pasture of the property deeded to Larry CLARKE. When walking near the south west corner of the property I saw a single wide trailer that had a wooden building attached to it. As I traveled in the woods and got within seventy-five to one hundred yards of the building I could smell the odor of fermenting mash, a smell that I recognized from my training and experience to be a by product used in the manufacture of nontaxpaid alcoholic beverage, I could also see two small trailers covered by tarps parked in the yard of the building. I saw a large gauge PVC pipe coming cut of the ground near what locked like a pit dug in the ground.

On January 8, 1999 between 12:00 pm and 1:15 pm, while conducting surveillance from the wooded area of the Clarke property, Agent Wes Nipper Wake County ABC (WCABC) smelied the odor of fermenting mash emanating from the area of the building previously mentioned. He also saw hot water coming out of a pipe at the rear or east side of the building and heard several male voices coming from the building. While surveilling the building an unidentified white male with a black cap was seen exiting the building from two large doors on the west side of the building.

On January 13, 1998, from a position in the woodline, Agents Nipper, Rickey Barber (WCABC) and I again conducted surveillance on the building. From the woods we could clearly see radiant heat rising from the tin roof of the building and could hear the jet like sound of, what I recognized, as a propane gas burner. At 7:45a.m. Agent Nipper find I saw an unidentified white male with a graying black goatee and mustache, red shirt and blue pants walk out of the west side of the wood building. At 8:45 am, a maroon full size Chevrolet truck, pulling a dual axel U-Haul trailer, drove into the yard of the building driven by Larry F. CLARKE. The unidentified male assisted CLARKE in backing up the truck and trailer next to the building. They both entered the building and each exited carrying six gallon jugs of what appeared to be non taxpaid alcohol.

They loaded the U-Haul trailer with liquor taken from the building until 12:00 p.m. They then took the tarp off one of the two trailers parked in the yard, which was also loaded with what appeared to be nontaxpaid

liquor. They continued to load the U-Haul with the liquor jugs taken from the other trailer until 12:25p.m. and shut the doors of the U-Haul. CLARKE got into the truck and towed the trailer a short distance and stopped. At 12:35 a.m. a white male, later identified as DELMON LEE JR., walked onto the yard. LEE had a short conversation with CLARKE and then LEE took a tape measure and began to measure The Trailer as CLARKE followed him around the trailer and appeared to calculate the measurements. LEE opened the doors of the U-Haul *and* began to move some of the liquor jugs and stack them while CLARKE and the other male assisted him. At 1:15 p.m. CLARKE left the area walking and returned at 1:45 p.m. driving a blue Ford tractor. CLARKE, with the assistance of LEE and the other male, attached a chain to the back of the tractors three point hitch and lifted the trailer off the ball of the truck. The men remained on the sight walking in and out of the building.

At 2:00 p.m. Agent Nipper and I broke off the close surveillance of the building and moved to a position on the south east corner of the property and were relieved by Agents Glen Branch and Burnis Wilkins, NC ALE. Branch reported the U-Haul did not move until 8:30 p.m. when CLARKE towed it off the property with the blue tractor into L&D mobile home park, located directly across the street from his residence on Bethel Baptist Rd. Branch and Wilkins watched the U-Haul, which was parked between the first two trailers of the trailer park, until 12:30 a.m. January 14, 1999. Continuing the surveillance on January 14, 1999 at 12:30a.m. Agent Brad Peerson (WCASC) and I watched the U-Haul until being relieved at 7:45 a.m. by

Agents Nipper and Barber WCABC) who continued the surveillance until 1:00 p.m. The U-Haul was not moved or encroached during this surveillance. At 1:00 p.m. the Agents broke off their close surveillance and NCALE Supervisor Jackson, conducted a road surveillance of the U-Haul until 12:00a.m. January 15, 1999 during which time the U-Haul did not move. At 12:00a.m. a close surveillance was again initiated until 6:45a.m. at which time Supervisor Jackson again conducted road surveillance of the U-Haul until a search warrant was executed on it at 1:30p.m. January 15, 1995. The U-Haul was not moved during the entire surveillance.

On January 15, 1999 at 1:00p.m. North Carolina State Alcohol Law Enforcement, Wake County ABC, and Harnett County Sheriff's office Agents met and conducted a raid plan of the search warrants to be executed at the CLARKE property, the U-Haul trailer and DELMON LEE'S residence. Harnett county Deputies had obtained a warrant for the LEE residence based on the sales of alcoholic beverages that had been made on previous dates. NCALE Supervisor Jackson instructed that all three warrants should be executed simultaneously. Harnett County Deputies would execute the warrant at the LEE residence and NCALE Agents and Wake County ABC Agents would go to the CLARKE property with the exception of Supervisor Jackson who would serve the warrant at the U-Haul.

At 1:30 p.m. January 15, 1999 I executed the search warrant for the CLARKE property. No persons were at the building when I arrived. The large wooden doors on the west side of the building were unlocked and

opened. Inside the building I found a fully operational distillery with eight submarine cockers, fermenting mash in eight fifteen hundred and fifty gallon chemical vats and a finished product of nontaxpaid liquor in a large proofing tank. Photographs and an inventory of all items seized and or destroyed were taken. The quantity of mash destroyed was calculated by two methods: the first by measuring the 4ftx8ftx2ft cookers. Each are capable of holding 478.75 gallons of mash but are in practice referred to as "440's" as they are not totally full.
It was determined the eight cookers, 4 of which were empty, held 1600 gallons of mash in total. This measurement was calculated by multiplying the length, width and mash level height, in inches, of the cookers, and dividing that number by 231 to determine gallon capacity. Three cookers measured 48inx96inx23in of mash each (1376.4l gallons) .The fourth measured 1/2 full at 48inx96x12 of mash (239.3 gallons). The second method of mash calculation was determined by using the factory stamped gallon indicators located on the sides of the eight 1550 gallon chemical vats. The levels were determined by using the lowest level indicator closest to the actual mash level and added for a total of 7,885 gallons of mash.

AGENT'S NAME: John M. Adorjan	AGENT'S SIGNATURE: /s/	DATE: 01/21/99	SUPERVISOR'S REVIEW: /s/

BRIEF FOR TAX HEARING
DOCKET NUMBER 99-62

DATE SCHEDULED: May 6, 1999
HOUR: 2:00 P.M.

NAME OF TAXPAYER: Delmon Lee, Jr.

ADDRESS: 2285 Bethel Baptist Road, Spring Lake, North Carolina 28390

SCHEDULE: "BD" Unauthorized Substance Tax

DATE OF ASSESSMENT: January 19, 1999

TAX: $32,006.40 PENALTY: $3,200.64
INTEREST: $213.38 TOTAL: $35,420.42

The Department of Revenue has a proposed unauthorized substance tax assessment against Delmon Lee, Jr. 2285 Bethel Baptist Road, Spring Lake, North Carolina 28390, hereinafter known as "Taxpayer," pursuant to G. S. 105-113.105 et. seq.

AN: 250066

In December, 1998 officers with the North Carolina Alcohol Law Enforcement received a complaint that there was an illegal distillery located behind a large white house on Bethel Baptist Road. On December 18, NCALE received information from the Harnet County Sheriff's Department that a confidential informant had purchased nontaxpaid alcoholic beverages from the taxpayer's residence. The

confidential informant had also seen several gallons of nontaxpaid alcohol at the taxpayer's residence, but was told that the distillery was not at the taxpayer's residence but close by.

On January 15, when officers executed the search warrant to search the co-taxpayer's property, the taxpayer and co-taxpayer agreed to go with officers to the distillery. The search revealed a fully operational distillery with eight submarine cookers, fermenting mash in eight fifteen hundred and fifty gallon chemical vats and a finished product of nontaxpaid liquor in a large proofing tank. The co-taxpayer advised officers that they had trouble getting sugar and the contents in the chemical vats couldn't be considered as mash. The taxpayer also stated "this place hadn't even turned a profit yet the nails are barely set in the wood." At the time of confiscation the taxpayer had actual and/or constructive possession and control of the unauthorized substances.

The moonshine, an illicit spirituous liquor as defined by G.S. 105-113.68 and the mash as defined by G. S. 105-113.106(6a), did not have revenue stamps affixed as required by G.S. 105-113.109. Said unauthorized substance required that an assessment be made against the person in possession pursuant to G.S. 105-113.111. The taxpayer had actual and or constructive possession of the unauthorized substances and was required to pay the tax due on same. Form BD-4L "Report of Arrest and/or Seizure Involving Nontaxpaid (Unstamped) Illicit Liquor" was prepared on January 15, 1999.

On January 19, 1999, a notice of tax assessment in the total sum of $35,420.42, including tax, penalty and interest, and based on possession of 9,485.00 gallons of mash and 1,552.00 gallons of moonshine, was prepared by J. S. Powell, Enforcement Officer for the Unauthorized Division, and served on the taxpayer as required by law. The taxpayer objected to the assessment and requested a hearing before the Secretary of Revenue within the time allowed by law.

Issues To Be Resolved

1. Did Taxpayer actually or constructively possess 9,485.00 gallons of mash and 1,552.00 gallons of moonshine?

2. Are taxes due on possession of the the unauthorized substances found in the possession of the taxpayer?

The Department contends that the issues should be answered in the affirmative. Officers had received information from a confidential informant that the taxpayer was selling nontaxpaid liquor from his residence. The illicit moonshine and mash were in the possession and control of the taxpayer. The taxpayer failed to make application for illicit liquor stamps.

SUMMARY

It is the Department of Revenue's position that the taxpayer was in possession of 9,485.00 gallons of mash and 1,552.00 gallons of moonshine, that the taxpayer is liable to the State of North Carolina in the

amount of the tax, penalty, and accrued interest.

/s/
Director, Unauthorized Substance Division

IMPORTANT
Action Must Be Taken
IMMEDIATELY

DEPARTMENT OF REVENUE
P.O. BOX 25000
Raleigh, N.C. 27640

AN: 20066

NOTICE OF UNAUTHORIZED SUBSTANCE TAX ASSESSMENT

Delmon Lee Jr
2285 Bethel Baptist Road
Spring Lake, NC 28390

January 19, 1999
240-60-0835
Harnett

YOU ARE HEREBY NOTIFIED that an assessment of unauthorized substance tax plus interest and any applicable penalty is proposed against you as follows:

TAX	PENALTY	INTEREST	TOTAL
$32,006.40	$3,200.64	$213.38	$35,420.42

Substances included in this tax assessment are:

	Taxable Quantity	Tax Rate	Tax Amount
9485.00 gallons Mash	9,485.00	1.28	12,140.80
1552.00 gallons Moonshine	1,552.00	12.80	19,865.60

* INTEREST ACCRUES ON ALL UNPAID TAXES FROM JANUARY 15, 1999 TO THE DATE OF PAYMENT.

This assessment is proposed pursuant to G.S. 105-113.111 (See attached copy). If you desire a hearing before the Secretary of Revenue with respect to this proposed assessment, you must submit a written request for hearing within thirty days after the date of this notice, as provided by G.S. 105-241.1. Your request should set forth in detail your objection to the assessment and must be timely served upon the Secretary of Revenue addressed to Unauthorized Substance Tax Division. Unless your application for hearing is filed within the time stated, this proposed assessment will become final and conclusive without further notice.

In the event you fail to respond immediately to this proposed assessment by remitting the full amount shown due or by posting a bond, collection may proceed pursuant to G.S. 105-241.1(g) or G.S. 105-242 without regard to whether you have requested a hearing.

SECRETARY OF REVENUE

By: J. S. POWELL
ENFORCEMENT OFFICER

Muriel K. Offerman, Secretary

IN THE MATTER OF

ID: 240-60-0835
AN: **250066**

Delmon Lee Jr
2285 Bethel Baptist Road
Spring Lake, NC 28390

WARRANT FOR COLLECTION OF TAXES

STATE OF NORTH CAROLINA -

To any Revenue or Enforcement Officer of the North Carolina Department of Revenue:

WHEREAS, Delmon Lee Jr is indebted to the State of North Carolina on account of duly assessed and delinquent taxes, penalties and interest as follows:

POSSESSION DATE: January 15, 1999

TAX	PENALTY	INTEREST	LESS PAID	TOTAL
$32,006.40	$3,200.64	$213.38	$0.00	$35,420.42

Per Notice of Unauthorized Substance Tax Assessment

AND WHEREAS, said taxes are now delinquent and unpaid;

NOW, THEREFORE, pursuant to G.S. 105-242, (a)(2) you are hereby ordered and commanded to levy upon and sell the personal property of the said taxpayer

found within the State of North Carolina, or so much thereof as may be necessary to pay and satisfy said indebtedness and your costs hereof, and to return to the undersigned the monies collected hereunder within ninety days from the date of receipt of this order.

WITNESS my hand and official seal, this the 15th **day of** January, 1999.

/s/ Muriel K. Offerman

Secretary of Revenue

By: /s/ John G. Powell
Enforcement Officer

FORM RO 1000

NORTH CAROLINA DEPARTMENT OF REVENUE—RALEIGH

Official Receipt of Revenue Officer
COLLECTION DESCRIBED RECEIVED BY THE UNDERSIGNED

NO. H 1493678 Date 1/15 1999

Name Delmon Lee Jr
City Spring Lake Street or R.F.D. 2285 Bethel Baptist Rd
County Harnett AMOUNT
Schedule "E" For Period
Sch. "D" For Year
Sch. "B" G. S. Year
Sch. BD 32006.00
Sch. AN 250066
Sch.
Cash ☒ Check ☐ Total 32006.00
M.O. ☐ Signed /s/ Judy G. Powell

TAXPAYER'S COPY

G.S. 105-113.111 is in part as follows:

"If the dealer does not pay the tax penalty, and interest immediately upon receipt of the notice and demand, the Secreatary shall collect the tax, penalty, and interest pursuant to the procedure... set forth in G.S. 105-242 . . ."

G.S. 105-2(a)(2) is in part as follows:

"The Secretary may issue a warrant or order under the Secretary's hand and seal to any revenue officer or other employee of the Department of Revenue charged with the duty to collect taxes, commanding the officer or empolyee to levy upon and sell the taxpayer's personal property, . . . found within the State for the payment of the tax, including penalties and interest."

RETURN OF REVENUE OFFICER

ON THE 15TH DAY OF

JANUARY, 1999

I DEM AND LEVY MADE THE 15TH

JANUARY, 1999

TURN . . . . . .
$32006.00 IN

US CURRENCY

/s/ Judy G. Powell
REVENUE OFFICER

NO. D2180 NO. 99000513

PROPERTY/EVIDENCE CARD

Item Brand Name Model Serial No.

OTHER DESCRIPTION OR IDENTIFYING MARKS: (ONE ITEM ONLY)
$5,194.00 U S Currency

OFFENSE AS REPORTED LOCATION OF OFFENSE
Manufacture Non-Tax Paid Alcohol

DATE TIME
1/15/99

REPORTED BY PLACE WHERE RECOVERED

HOW RECOVERED NCIC NO.

RECOVERED BY DATE TIME

COMPLAINANT SUSPECT
Jaggers Larry Fitch Clark Sr
Delmon Lee

SIGNATURE OF RECOVERING OFFICER OR OFFICER FIRST RECEIVING
B-5

DATE & TIME

CHAIN OF POSSESSION	DATE	ANALYSIS RESULTS
FROM EDDIE JAGGER		ITEM ANALYZED
TO	1-25-99	DATE & TIME DELIVERED TO ANALYST
FROM MARIE HAIRR		DATE & TIME RECEIVED FROM ANALYST
TO JUNIOR LEE		DATE & TIME ANALYZED
FROM		ANALYZED BY
TO		RESULTS OF ANALYSIS
FROM		
TO		

Check appropriate block
____ Original Report
____ Amended Report

Form BD-4L
(12-97)

NORTH CAROLINA DEPARTMENT OF REVENUE
UNAUTHORIZED SUBSTANCE TAX DIVISION
P.O. BOX 25000
RALEIGH, NORTH CAROLINA 27640

REPORT OF ARREST AND/OR SEIZURE
INVOLVING NONTAXPAID
(UNSTAMPED) ILLICIT LIQUOR
(Complete in quadruplicate)

(1) Report agency:

Name: Harnett County Sheriff's Office
Address: 1005 Edward Drive/POB 399
City: Lillington County: Harnett
State: N.C.
Name of arresting officer: D.E. Jaggers
Telephone number: (910) 893-7132
Report Date: 1/15/99

(2) Identification of the individual arrested in possession of the substance(s):

Name: Delmon Lee Junior
Social Security Number: 240-60-0835
Street Address: 2285 Bethel Baptist Road
City: Spring Lake State: NC Zip Code: 28390
Drivers license number/State: 960206/NC
Date of birth: 06-26-40

(3) Time and place of arrest and/or seizure:

Date: 1/15/99 Time: 1300 hrs (a.m.) (p.m.)

Street address or specific location: 2285 Bethel Baptist Rd.

City: Spring Lake County: Harnett

(4) Amount of nontaxpaid (unstamped) illicit liquor, by type, possessed and/or seized

Illicit Spirituous Liquor sold
by the drink ..... _____ gallons
Illicit Spirituous not sold
by the drink ..... Moonshine 1552 gallons
Mash ..... 9485 gallons
Illicit Mixed Beverages ..... ____ liters

(5) DISTRIBUTION

GENERAL FUND	25%
Harnett CO SD	37.5%
NCALE	37.5%

CS - 3

(5) Identification and location of any personal or real property in possession of or belonging to the individual named above (if known):

_____

_____

AN250066

(Copy 1 – To Department of Revenue)
(Copy 2 – To State Bureau of Investigation)
(Copy 3 – To Defendant)
(Copy 4 – For Reporting Agency)

§ 105-241.1. Additional taxes; assessment procedure.

(a) Proposed Assessment. – If the Secretary discovers that any tax is due from a taxpayer, the Secretary must notify the taxpayer in writing of the kind and amount of tax due and of the Secretary's intent to assess the taxpayer for the tax. The notice must describe the basis for the proposed assessment and identify the amounts of any tax, interest, additions to tax, and penalties included in the proposed assessment. The notice must also advise the taxpayer that the proposed assessment will become final unless the taxpayer requests a hearing within the time set in subsection (c) of this section.

The Secretary must base a proposed assessment on the best information available. A proposed assessment of the Secretary is presumed to be correct.

(b) Delivery of Notice. – The Secretary shall deliver the notice of a proposed assessment to a taxpayer either in person or by United States mail sent to the taxpayer's last known address. A notice mailed to a taxpayer is presumed to have been received by the taxpayer unless the taxpayer makes an affidavit to the contrary within 90 days after the notice was mailed. If the taxpayer makes this affidavit, the time limitations in subsection (c) apply as if the notice had been delivered on the date the taxpayer makes the affidavit.

(c) Hearing. – A taxpayer who objects to a proposed assessment of tax is entitled to a hearing before the Secretary as provided in this subsection. To obtain a hearing, the taxpayer must file a written

request either for a hearing or for a written statement of the information and evidence upon which the proposed assessment is based. If the notice of a proposed assessment was mailed, the taxpayer's request must be filed within 30 days after the date the notice was mailed; if the notice of a proposed assessment was delivered in person, the taxpayer's request must be filed within 30 days after the date the notice was delivered.

When a taxpayer files a timely request for a written statement of the information and evidence upon which a proposed assessment is based, the Secretary must give the written statement to the taxpayer within 45 days after the taxpayer filed the request. A taxpayer who files a timely request for a written statement concerning a proposed assessment and who desires to have a hearing on the proposed assessment must file a written request for a hearing within 30 days after the written statement was mailed.

When a taxpayer files a timely request for a hearing, the Secretary must set the time and place at which the hearing will be conducted and must notify the taxpayer of the designated time and place within 60 days after the taxpayer filed the request for a hearing and at least 10 days before the date set for the hearing. The date set for the hearing must be within 90 days after the timely request for a hearing was filed or at a later date mutually agreed upon by the taxpayer and the Secretary. The date set for the hearing may be postponed once at the request of the taxpayer and once at the request of the Secretary for a period of up to 90

days or for a longer period mutually agreed upon by the taxpayer and the Secretary.

The taxpayer may present any objections to the proposed assessment at the hearing. The rules of evidence do not apply at the hearing.

Within 90 days after the Secretary conducts a hearing on a proposed assessment, the Secretary must make a decision on the proposed assessment and notify the taxpayer of the decision. The decision must assess the taxpayer for the amount of any tax the Secretary determined to be due.

(d) Assessment. – If a taxpayer does not apply for a hearing in accordance with subsection (c) of this section, a proposed assessment becomes final without further notice. If a taxpayer applies for a hearing in accordance with subsection (c) of this section, a proposed assessment becomes final when the taxpayer is notified of the decision made after the hearing. An assessment that is final is immediately due and collectible. G.S. 105-241.2, 105-241.3, and 105-241.4 apply to a tax assessed under this section.

Except in the case of a jeopardy assessment, the Secretary may not assess a taxpayer for a tax until the notice required by subsection (a) has been given and one of the following has occurred:

(1) The time for applying for a hearing has expired.

(2) The Secretary and the taxpayer have agreed upon a settlement.

(3) The taxpayer has filed a timely application for a hearing and the Secretary, after conducting the hearing, has given the taxpayer written notice of the decision.

(d1) Notice of Assessment. - The Secretary must notify the taxpayer when a proposed assessment becomes final and is therefore collectible. The notice must identify the amounts of any tax, interest, additions to tax, and penalties included in the assessment. The notice must include or be accompanied by a brief statement in simple and nontechnical terms of all of the following:

(1) The Department's authority to, and procedure for, levy on and sale of the taxpayer's property.

(2) The taxpayer's available administrative appeals regarding the levy and sale of property, including the procedures for appeal.

(3) Other options available to the taxpayer that could prevent levy on the property.

(4) Procedures to redeem property and obtain release of a lien on property.

(e) Statute of Limitations. - There is no statute of limitations and the Secretary may propose an assessment of tax due from a taxpayer at any time if (i) the taxpayer did not file a proper application for a license or did not file a return, (ii) the taxpayer filed a false or fraudulent application or return, or (iii) the taxpayer attempted in any manner to fraudulently evade or defeat the tax.

If a taxpayer files a return reflecting a federal determination as provided in G.S. 105-29, 105-130.20, 105-159, 105-160.8, 105-163.6A, or 105-197.1, the Secretary must propose an assessment of any tax due within one year after the return is filed or within three years of when the original return was filed or due to be filed, whichever is later. If there is a federal determination and the taxpayer does not file the required return, the Secretary must propose an assessment of any tax due within three years after the date the Secretary received the final report of the federal determination.

If a taxpayer forfeits a tax credit or tax benefit pursuant to forfeiture provisions of this Chapter, the Secretary must assess any tax due as a result of the forfeiture within three years after the date of the forfeiture. If a taxpayer elects under section 1033(a)(2)(A) of the Code not to recognize gain from involuntary conversion of property into money, the Secretary must assess any tax due as a result of the conversion or election within the applicable period provided under section 1033(a)(2)(C) or section 1033(a)(2)(D) of the Code. If a taxpayer sells at a gain the taxpayer's principal residence, the Secretary must

assess any tax due as a result of the sale within the period provided under section 1034(j) of the Code.

In all other cases, the Secretary must propose an assessment of any tax due from a taxpayer within three years after the date the taxpayer filed an application for a license or a return or the date the application or return was required by law to be filed, whichever is later.

If the Secretary proposes an assessment of tax within the time provided in this section, the final assessment of the tax is timely.

A taxpayer may make a written waiver of any of the limitations of time set out in this subsection, for either a definite or an indefinite time. If the Secretary accepts the taxpayer's waiver, the Secretary may propose an assessment at any time within the time extended by the waiver.

(f) Repealed by Session Laws 1993, c. 532, s. 2.

(g) Jeopardy Assessments. - Notwithstanding any other provision of this section, the Secretary may at any time within the applicable period of limitations immediately assess any tax the Secretary finds is due from a taxpayer if the Secretary determines that collection of the tax is in jeopardy and immediate assessment is necessary in order to protect the interest of the State. For a jeopardy assessment, the Secretary may give the taxpayer the notice of proposed assessment required by subsection (a) any time within

30 days after the jeopardy assessment is made. The taxpayer may request a hearing on the jeopardy assessment by following the procedure described in the notice.

Within five days after a jeopardy assessment is made under this subsection that is not the result of a criminal investigation or of a liability for a tax imposed under Article 2D of this Chapter, the Secretary must provide the taxpayer with a written statement of the information upon which the Secretary relied in making the assessment. Within 30 days after receipt of this written statement or, if no statement is received, within 30 days after the statement was due, the taxpayer may request the Secretary to review the action taken. After receipt of this request, the Secretary must determine whether making the jeopardy assessment was reasonable under all the circumstances and whether the amount assessed is reasonable under all the circumstances. The Secretary must give the taxpayer written notice of this determination within 30 days after the request. The taxpayer may seek judicial review of this determination as provided in G.S. 105-241.5.

(h) Repealed by Session Laws 1993, c. 532, s. 2.

(i) Interest. - All assessments of tax, exclusive of penalties assessed on the tax, shall bear interest at the rate established pursuant to this subsection from the time the tax was due until paid. On or before June 1 and December 1 of each year, the Secretary shall establish the interest rate to be in effect

during the six-month period beginning on the next succeeding July 1 and January 1, respectively, after giving due consideration to current market conditions and to the rate that will be in effect on that date pursuant to the Code. If no new rate is established, the rate in effect during the preceding six-month period shall continue in effect. The rate established by the Secretary may not be less than five percent (5%) per year and may not exceed sixteen percent (16%) per year.

§ 105-241.2. Administrative review.

(a) Petition for Administrative Review. - Without having to pay the tax or additional tax assessed by the Secretary under this Chapter, any taxpayer may obtain from the Tax Review Board an administrative review with respect to the taxpayer's liability for the tax or additional tax assessed by the Secretary. Such a review may be obtained only if the taxpayer has obtained a hearing before the Secretary and the Secretary has rendered a final decision with respect to the taxpayer's liability. If a taxpayer has made a timely written demand for refund of an alleged overpayment and the Secretary has issued a decision denying part or all of the claimed refund, the taxpayer may obtain from the Tax Review Board an administrative review of the Secretary's decision. To obtain administrative review the taxpayer must take the following actions:

(1) Within 30 days after the Secretary's final decision is issued, file with the Tax Review Board, with a copy to the Secretary, notice of intent to file a petition for review.

(2) Within 60 days after filing a notice of intent under subdivision (1) of this subsection, file with the Tax Review Board, with a copy to the Secretary, a petition requesting administrative review and stating in concise terms the grounds upon which review is sought.

(b) Secretary to Provide Records. - Upon receipt by the Secretary of the taxpayer's petition, the Secretary shall transmit to the Tax Review Board all of the records, data, evidence, and other materials in the Secretary's possession pertaining to the matters the Tax Review Board is being requested by the taxpayer to review. The Secretary shall also transmit to the Board a copy of the decision of the Secretary on the matters.

(b1) Hearing. - Within 60 days after a timely petition for administrative review has been filed and at least 10 days before the date set for the hearing, the Tax Review Board shall notify the taxpayer and the Secretary in writing of the time and place at which the hearing will be conducted. The hearing shall be held in Raleigh and the date set for the hearing shall be within 90 days after the timely petition for administrative review was filed or at a later date mutually agreed upon by the taxpayer and the Secretary. The date set for the hearing may be postponed once at the request of the taxpayer and once at the request of the Secretary for a period of up to 90 days or for a longer period mutually agreed upon by the taxpayer and the Secretary. Officers and employees of the Revenue Department, when so requested by the Board, shall attend hearings on petitions for review and shall furnish the Board with all information they have respecting the asserted liability. The Tax Review Board may establish the procedure to be followed in hearings before it and may establish a

schedule of costs of the proceedings. At least two members of the Board shall sit at the hearing and all members shall consider and decide the matters on review.

(b2) Decision of Tax Review Board. - Within 90 days after conducting a hearing under this section, the Board shall confirm, modify, reverse, reduce, or increase the assessment or decision of the Secretary, furnish a written copy of its order to the Secretary, and serve a written copy of its order upon the taxpayer by personal service or by registered mail (return receipt requested). If the decision of the Tax Review Board does not result in a reduction of the tax liability asserted by the Secretary to be due, or if the Tax Review Board dismisses the petition under subsection (c) of this section, the costs of the proceeding shall be added to and shall become a part of the tax liability to be collected by the Secretary. If the decision of the Tax Review Board should result in a reduction of the tax liability asserted by the Secretary to be due or in a refund to the taxpayer, no costs shall be taxed against the taxpayer. Any overpayment of tax determined by the decision of the Tax Review Board, together with interest thereon at the rate and for the period provided under G.S. 105-266, shall be refunded by the State.

(c) Frivolous Petitions. - Upon receipt of a petition requesting administrative review as provided in the preceding subsection, the Tax Review Board shall examine the petition and the records and other data transmitted by the Secretary pertaining to the matter for which review is sought, and if it appears from the records and data that the petition is frivolous or filed for the purpose of delay, the Tax Review Board shall dismiss the petition for review.

(d) Repealed by Session Laws 1993, c. 532.

(e) Jeopardy Levies. - At any time the Secretary may, if in the Secretary's opinion, such action is necessary for the protection of the interest of the State, proceed at once to levy the assessment for the amount of the tax against the property of the taxpayer seeking the administrative review. In levying the assessment the Secretary shall make a certificate verifying the essential parts relating to the tax, including the amount thereof asserted to be due, the date when same is asserted to have become due and payable, the person, firm, or corporation chargeable therewith, and the nature of the tax. The Secretary shall transmit this certificate to the clerk of the superior court of any county in which the taxpayer resides or has property; whereupon, it shall be the duty of the clerk of the superior court of the county to docket the certificate and to index it on the cross index of judgments. When so docketed and indexed, the certificate of tax liability shall constitute a lien upon the property of the taxpayer to the same extent as that provided for by G.S. 105-241. No execution shall issue on the certificate before final determination of the

administrative review by the Tax Review Board; provided, however, if the Secretary determines that the collection of the tax would be jeopardized by delay, the Secretary may cause execution to be issued, as provided in this Chapter, immediately against the personal property of the taxpayer unless the taxpayer files with the Secretary a bond in the amount of the asserted liability for tax, penalty and interest. If upon final administrative determination the tax asserted or any part thereof is sustained, execution may issue on the certificate at the request of the Secretary and the sheriff shall proceed to advertise and sell the property of the taxpayer.

Within five days after a jeopardy levy is made under this subsection that is not the result of a criminal investigation or of a liability for a tax imposed under Article 2D of this Chapter, the Secretary must provide the taxpayer with a written statement of the information upon which the Secretary relied in making the levy. Within 30 days after receipt of this statement or, if no statement was received, within 30 days after the statement was due, the taxpayer may request the Secretary to review the action taken. After receipt of this request, the Secretary shall determine whether the levy was reasonable under the circumstances. The Secretary shall give the taxpayer written notice of this determination within 30 days after the request. The taxpayer may seek judicial review of this determination as provided in G.S. 105-241.5.

(f) Repealed by Session Laws 1993, c. 532, s. 3. (1955, c. 1350, s. 5; 1957, c. 1340, s. 10; 1973, c. 476, s. 193; 1993, c. 532, s. 3; 1993 (Reg. Sess., 1994), c. 745, ss. 15, 16; 1995, c. 17, s. 10; 1998-212, s. 29A.14(n).)

§ 105-241.4. Action to recover tax paid.

Within 30 days after notification of the Secretary's decision with respect to liability under this Subchapter or Subchapter V, any taxpayer aggrieved thereby, in lieu of petitioning for administrative review thereof by the Tax Review Board under G.S. 105-241.2, may pay the tax and bring a civil action for its recovery as provided in G.S. 105-267.

Any taxpayer who has obtained an administrative review by the Tax Review Board as provided by G.S. 105-241.2 and who is aggrieved by the decision of the Board may, in lieu of appealing pursuant to the provisions of G.S. 105-241.3, within 30 days after notification of the Board's decision with respect to liability pay the tax and bring a civil action for its recovery as provided in G.S. 105-267.

Either party may appeal to the appellate division from the judgment of the superior court under the rules and regulations prescribed by law for appeals, except that if the Secretary appeals, the Secretary is not required to give any undertaking or make any deposit to secure the cost of the appeal.

Any taxes, interest or penalties paid and found by the court to be in excess of those which can be properly assessed shall be ordered refunded to the taxpayer with interest from time of payment. (1955, c. 1350, s. 7; 1957, c. 1340, s. 10; 1967, c. 1110, s. 9; 1969, c. 44, s. 65; 1973, c. 476, s. 193; 1991, c. 45, s. 26.)

§ 105-267. Taxes to be paid; suits for recovery of taxes.

No court of this State shall entertain a suit of any kind brought for the purpose of preventing the collection of any tax imposed in this Subchapter. Whenever a person has a valid defense to the enforcement of the collection of a tax, the person shall pay the tax to the proper officer, and that payment shall be without prejudice to any defense of rights the person may have regarding the tax. At any time within the applicable protest period, the taxpayer may demand a refund of the tax paid in writing from the Secretary and if the tax is not refunded within 90 days thereafter, may sue the Secretary in the courts of the State for the amount demanded. The protest period for a tax levied in Article 2A, 2C, or 2D of this Chapter is 30 days after payment. The protest period for all other taxes is three years after payment.

The suit may be brought in the Superior Court of Wake County, or in the county in which the taxpayer resides at any time within three years after the expiration of the 90-day period allowed for making the refund. If upon the trial it is determined that all or part of the tax was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the judgment shall be collected as in other cases. The amount of taxes for which judgment is rendered in such an action shall be refunded by the State. G.S. 105-241.2 provides an alternate procedure for a taxpayer to contest a tax and is not in conflict with or superseded by this section. (1939, c. 158, s. 936; 1955,

c. 1350, s. 15; 1957, c. 1340, s. 10; 1977, c. 946, s. 1; 1996, 2nd Ex. Sess., c. 14, s. 10.1; 1998-98, s. 13.1(c); 1999-415, s. 5.)